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OF THE
LELAND STANFORD JR. UNIVERSITY

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS, WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

VOL. CVI.

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JAMES PARSONS, Esq.,
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OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD OF THESE REPORTS.

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CASES

ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

Michaelmas Term,

IN THE

TWENTY-SIXTH YEAR OF THE REIGN OF VICTORIA. 1862.

The Judges who usually sat in banco in this Term, were,—

ERLE, C. J., BYLES, J., and
WILLIAMS, J., KEATING, J.

MEMORANDA.

SIR ROBERT JOSEPH PHILLIMORE, Knt., Doctor of Civil Law, having been appointed Her Majesty's Advocate-General, in the room of Sir John D. Harding, Knt., resigned, was on the first day of this term called upon to take his seat within the Bar accordingly.

The following gentlemen who had, in the Vacation preceding this term, been appointed Her Majesty's Counsel learned in the Law, were also called upon to take their seats within the Bar:—

John Robert Kenyon, Esq., of Lincoln's Inn.
Thomas Southgate, Esq., of Lincoln's Inn.
Arthur Hobhouse, Esq., of Lincoln's Inn.

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*REGULA GENERALIS. [*2

Affidavits of verification of certificates of acknowledgments under 3 & 4 W. 4, c. 74.

1. From and after the first day of Easter Term next, inclusive, every affidavit of the verification of certificates of acknowledgments of deeds of married women, except as hereinafter provided, shall be

drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject: Provided that this rule shall not be applicable to any such affidavits, where the acknowledgments have been taken out of England and Wales under special commissions issued prior to the said first day of Easter Term next.

2. The officer with whom all such certificates are filed is empowered in the interval between the date of this rule and the said first day of Easter Term next, to receive and file any affidavits of verification, whether drawn up in the first or third person.

Nov. 24th, 1862. By the Court.

*3] *REGISTRATION CASES.

MICHAELMAS TERM, 1862.

No. 1. Borough of BEDFORD.

WILLIAM SAMUEL, Appellant; ADAM HITCHMOUGH, Respondent. *Nov.* 18.

A notice of objection to a borough voter, in the form prescribed by the schedule B. No. 11, to the 6 & 7 Vict. c. 18, described the objector as being "on the list of voters for the parish of St. Paul." It appeared that there were two lists made out for the parish of St. Paul, viz. the 10*l.* or new qualification list and the reserved right list. The revising barrister decided that the description of the objector was insufficient, for not stating on which of the two lists his name appeared.

The Court reversed his decision.

AT a Court held for the revision of the lists of voters for the borough of Bedford, William Samuel objected to the name of Adam Hitchmough being retained on the 10*l.* or new qualification list of voters for the borough of Bedford. A notice of objection was proved to have been duly served, in the following form:—

"To Mr. Adam Hitchmough.

"I hereby give you notice that I object to your name being retained on the list of persons entitled to vote in the election of members for the borough of Bedford. Dated this 23d day of August, 1862.

"WILLIAM SAMUEL,
"of Water Lane, St. Paul, Bedford,
"*on the list of voters for the parish of St. Paul.*"

It appeared that there were two lists made out for the parish of St. Paul, viz. the 10*l.* or new qualification list, and the reserved right list.

The revising barrister decided that the vote of the said Adam Hitchmough was bad. But it was objected, on behalf of the said Adam Hitchmough, that the notice of objection was bad, inasmuch as the said William Samuel stated himself in the notice, to be "on the list of voters for the parish of St. Paul," whereas he should have stated himself to be on the 10*l.* or new qualification list of voters for the said parish.

The revising barrister held the notice to be bad, and retained the name on the list.

*He was then applied to, on the part of William Samuel, to amend the notice, by adding thereto the list of voters on which his name appeared: but he held, that, under the 101st section of the 6 & 7 Vict. c. 18, to which he was referred, he had no power to do so. [*4

If the Court should be of opinion that the notice of objection was sufficient in stating that William Samuel (the objector) was on the list of voters for the parish of St. Paul, in the borough of Bedford, or if the Court considered that the revising barrister had power to amend the notice by adding thereto that William Samuel was on the 10*l.* or new qualification list of voters for the parish of St. Paul, the name of Adam Hitchmough was to be expunged from the list; or, if the Court should be of opinion that the notice was bad for the reason assigned, and that the revising barrister had not power to amend the same, the name of Adam Hitchmough was to be retained in the list.

At the same Court, the names of Robert Graves, Horatio James Huggins, Joseph Diemer, and Thomas Morton, all on the 10*l.* or new qualification list of voters for the parish of St. Paul, and the names of Joseph Emery and William Saunderson on the 10*l.* or new qualification list of voters for the parish of St. Mary, were also objected to by the said William Samuel, and their votes were decided by the revising barrister to be bad; but the like objection to the form of notice of objection was made.

The validity of these objections depending and having been decided by the revising barrister on the same point of law, the cases of these last-mentioned persons were consolidated with the principal case.

Grant, for the appellant.—It is submitted that the notice in question was a sufficient compliance with the statute and the form given in the schedule. The 17th *section of the 6 & 7 Vict. c. 18, which authorizes the objection in the case of a city or borough, gives the form of the notice in Sched. B. No. 11: and there the mode of signature pointed out is, "A. B. of [*place of abode*], on the list of voters for the parish of ——;" which has been literally complied with here. It is true that a note is appended to the form No. 10, intimating that, if there be more than one list of voters, the notice of objection should specify the list to which the objection refers: but, in Wansey, app., Perkins, resp. (Quigley's Case), 8 Scott N. R. 954, 7 M. & G. 127 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 235, it was held that that note does not apply to the form No. 11. The respondent will, doubtless, rely upon Eidsforth, app., Farrer, resp., 4 C. B. 9 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 517: but that case is rather an authority to show that the signature to this notice is correct, seeing that no one has been or could be misled by it, and that it substantially conveys all the information which the legislature intended that the notice of objection should convey. All the lists (other than the list of freemen) are prepared and published by the overseers,—s. 13: the list of freemen is prepared and published by the town clerk,—s. 14: and, in truth, the reference here is to the list upon which both the objector and the person objected to stand. [WILLIAMS, J.—You say that "the list" means the register [*5

of the preceding year?] Yes. Eidsforth, app., Farrer, resp., shows that that is so. [ERLE, C. J.—The 27th section,—which enacts, "that, in case no list of voters shall have been made out for any parish, township, or place in any year, or in case such list shall not have been affixed in any place hereinbefore mentioned in that behalf, the register of voters for that parish, township, or place, then in force, shall be taken to be the list of voters for that parish, township, or place for
*6] the year then next ensuing, and *the provisions herein contained respecting any such list of voters shall be taken to apply to such register as aforesaid,"—seems rather to contradict your argument.] Brumfitt, app., Bremner, resp., 5 C. B. N. S. 1 (E. C. L. R. vol. 94), was also referred to.

A. K. Stevenson, for the respondent.—There is no such list as that to which the objector refers. Quigley's Case merely decides that the notice served upon the party objected to need not specify to what list the objection refers, because the person objected to must know upon which list his name appears. Here, the question is as to the description of the objector. The forms given in the statute are not to be followed implicitly, but must be adapted to the facts of the particular case. Eidsforth, app., Farrer, resp., is a distinct authority in favour of this objection. There, the objector described himself in the notice as "R. F., of, &c., on the list of voters for the borough of Lancaster." It appeared that the register of voters for the borough of Lancaster consisted of four separate lists, viz. one, of 10*l.* householders for each of three townships comprised in it, and one, of the freemen of the borough. The objector's name was on the last-mentioned list only: and the Court held that the description was insufficient, and the defect not amendable under s. 101. Wilde, C. J., in giving judgment, says: "The objector does not do that which the statute requires, by stating generally that he is on the list of voters for the borough; or, at all events, he does not do it so distinctly and explicitly as it ought to be done. It is not enough to say that the notice is so framed that the required information may with more or less difficulty be obtained elsewhere." [WILLIAMS, J.—Coltman, J., appears to have concurred with some reluctance in that decision.] Maule, J., says: "If the section in
*7] question had simply *provided that every person having a right to vote might give notice of objection, without prescribing any particular form of notice, I conceive, upon general principles, that the objector would have been bound to show what right he had to object; for, when a man has a power conferred upon him by Act of Parliament of dealing with the rights of another, he must show distinctly that he falls within the description of persons to whom such power is given." [WILLIAMS, J.—Has not the objector here given a notice in the form given in the schedule? BYLES, J.—He has followed the very words; and, as at present advised, I think he is right.] In Tudball, app., The Town Clerk of Bristol, Resp., 7 Scott N. R. 486, 5 M. & G. 6 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 7, the objector was described as "W. T., of, &c., on the list of voters for the parish of Clifton;" the name of W. T. appeared on the list of *freemen* of the city of Bristol only, and on that list he was described as of the parish of Clifton; and the notice was held insufficient. Tindal, C. J., there says: "It appears to me that the party objecting in this case has failed properly to describe him-

self: he has followed the form No. 11 in the schedule more closely than he should have done. He has untruly described himself as being 'on the lists of voters for the parish of Clifton,' whereas in fact his name only appears upon 'the list of the freemen of the city of Bristol.' It may be that the list of voters for the city are very numerous; any informality, therefore, of this sort would necessarily throw upon the party objected to a greater degree of difficulty in ascertaining by whom the objection is made than the Act of Parliament contemplated." [WILLIAMS, J.—The statement in the notice there was untrue.]

Grant was not called upon to reply.

*ERLE, C. J.—I am of opinion that the decision of the revising barrister in this case was wrong. The question is whether the [*8 objector has given a sufficient notice according to the requirements of the statute. It appears that he gave a notice in the form pointed out in the 17th section of the 6 & 7 Vict. c. 18 and the schedule B. No. 11, in which he signed and described himself as "William Samuel, of Water Lane, St. Paul, Bedford; on the list of voters for the parish of St. Paul." Now, the direction for the signature of the notice in the form No. 11, is thus,—"(*signed*) A. B., of, &c. [*place of abode*], on the list of voters for the parish of ——." The objector has therefore complied literally with the terms of the statute. There being *two* lists made out for the parish of St. Paul, viz. the 10*l.* or new qualification list, and the reserved right list, it has been contended that the notice was insufficient, because it would put the voter to the inconvenience of searching to which of the two lists the objector meant to refer. Even if there had been a departure from the directions of the statute, I should have paused before I held that to be such a degree of inconvenience as to induce me to hold the notice bad. But the statute has been strictly complied with: and the utmost that can be said is, that the voter is put to the trouble of looking at two lists which are stuck up together, in order to see that the party serving the notice is one who had a right to object. I see no serious hardship in that. We have been greatly pressed with the case of Eidsforth, app., Farrer, resp., 4 C. B. 9 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 517. There, the objector described himself in the notice as "R. F., of, &c., on the list of voters for the borough of Lancaster:" it appeared that the register of voters for the borough of Lancaster consisted of four separate lists, viz. one, of 10*l.* householders for each of three townships comprised in it, *and one, of the freemen of the borough; [*9 and that the objector's name was on the last-mentioned list only: and the Court, listening to the argument of inconvenience, said, that, as the objector did not do that which the statute requires, by stating generally that he was on the list of voters for the *borough*, his notice was bad; for that the voter might be put to the trouble of searching the three lists of 10*l.* householders, and perhaps then of resorting to the list of freemen. It is not for me to say anything more respecting that case than that this case differs from it, inasmuch as here there are but two concurrent lists, both of which are stuck up at the same place. In Tudball, app., The Town Clerk of Bristol, resp., 7 Scott N. R. 486, 5 M. & G. 6 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 7, the party claiming to object described himself as being "on the list of voters for the parish of Clifton," whereas his qualification was in respect of his being

on the list of *freemen* of the city of Bristol; and the Court held that he had not complied with the statute by properly describing himself. Here, the objector is described as "on the list of voters for the parish of St. Paul:" and I think that it is a sufficient compliance with the statute, although there are in fact two lists of voters for the parish. The appeal, therefore, must be allowed.

Williams, J.—I am of the same opinion. I fully admit, that, notwithstanding the 17th section does not distinctly require the objector to specify the particular list of voters on which his name is to be found, the case of Eidsforth, app., Farrer, resp., 4 C. B. 9 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 517, must be taken to be an authority to this effect, viz., that, if the objector cannot comply with the form No. 11, because the statement would not be true, nevertheless he must take care so to describe himself as not to be mislead; nor will it be *10] enough to give a *general description, leaving it doubtful whether the party's name appears on the list of freemen or on the parochial list. Eidsforth, app., Farrer, resp., I think, establishes that, but no more. The present case does not fall within the principle upon which that case was decided. Here, the objector's name is to be found upon one of the parochial lists, and the person objected to is not put to the trouble and inconvenience of hunting through the parochial lists on the church door, and then resorting to the list fixed on the town-hall under s. 23. If he goes to the church door, although he finds the parochial list arranged in two subdivisions, he will have little difficulty in finding there the name of the objector. The statement, therefore, that the objector's name is "on the list of voters for the parish of St. Paul," is both true in fact and a compliance with the statute; and it is not rendered bad by the circumstance of the parochial list happening to consist of two classes of voters, viz., 10*l.* householders, and pot-wallers, or whoever may be entitled to be registered under the clause in the statute relating to reserved rights.

Byles, J.—I am of the same opinion. As has already been pointed out by my Brother Williams, the 17th section of the 6 & 7 Vict. c. 18, makes the form obligatory. Now, the description of the objector given in form No. 11 is, "A. B., of ——, on the list of voters for the parish of ——." The notice here, therefore, is in the very words of the statute, which was not the case in Eidsforth, app., Farrer, resp. It is urged that the notice is bad because there are two lists of voters for the parish in question, viz., one of 10*l.* householders, the other of persons entitled to vote in respect of reserved rights. It is true there is that ambiguity; but, in the more important respects, they constitute *11] but one list. They are the lists of voters *for the parish of St. Paul, Bedford, and both are to be found on the church door, and will eventually be in form one list upon the register, as they are already one in substance. It would, perhaps, have been more correct if the objector had described himself as "on one of the lists of voters for the parish of St. Paul," or "on the 10*l.* householders' or new qualification list of voters for the parish of St. Paul." But that the healing section would cure the objection, if it be one, I cannot entertain a doubt. Eidsforth, app., Farrer, resp., seems at first sight to be a strong decision: but, when it comes to be carefully considered, I must say I think it right. The notice there did not follow the form given

by the statute: the objector described himself as "on the list of voters for the borough of Lancaster," and the register for the borough consisted of four separate lists, viz., one of 10*l.* householders for each of three townships comprised in it, and one of the freemen of the borough; and the objector's name was on the last-mentioned list only. Suppose this had occurred in the city of Norwich, which consists of twenty parishes, is the voter to search the lists on the church doors of all the twenty parishes before he can discover whether or not the person who objects to his vote is one who has a right to object? Not only, therefore, was the notice in that case a departure from the words of the statute, but it was radically and intrinsically wrong. If the notice had said "on the list of freemen for the borough of Lancaster," though not within the words, yet it would have been within the spirit and intent of the statute. It is enough to say that we may quite consistently with the decision in Eidsforth, app., Farrer, resp., hold this notice to be sufficient, and therefore that it is unnecessary to cast any doubt upon the propriety of the conclusion which the Court came to in that case.

*KEATING, J.—I am of the same opinion. For the reasons which have already been given, it seems to me that the case of Eidsforth, app., Farrer, resp., is distinguishable from the present. The Court there thought that the notice was bad because the form adopted might put the voter to more inconvenience than he ought to be put to. Here, however, the list of 10*l.* householders and of those entitled to vote in respect of reserved rights stand together on the same church door. The statute is complied with, and sufficient information is given. The appeal must be allowed. Decision reversed. [*12

No. 2. County of YORK.—North Riding.

JOHN BIRKS, Appellant; GEORGE ALLISON, Respondent.

(BRISBY'S Case.) *Nov.* 18.

One who occupied a farm of sufficient value to confer the franchise for a county was described in the third column of the register as "tenant." This description being objected to, the revising barrister held it to be "commonly understood as designating a tenant occupying at a rent," and therefore sufficient; but that, at all events, for the purpose of more clearly and accurately defining the qualification, he had power to amend by changing "tenant" into "farm, as occupying tenant," and he amended accordingly:—

The Court upheld his decision.

AT a Court held for the revision of the lists of voters for the North Riding of Yorkshire, William Brisby, whose name was on the list of voters for the township of Thornton, was duly objected to by John Birks.

The name of William Brisby stood thus upon the existing register:—

Thornton.

Christian name and surname, &c.	Place of abode.	Nature of qualification.	Street, lane, &c., where property situate, &c.
Brisby, William.	Thornton.	Tenant.	Newstead Grange.

*13] *It was proved that the voter occupied a farm, as tenant, at Newstead Grange; and that, apart from the question of sufficient registration, he had a good qualification in respect thereof.

On behalf of the objector, it was contended,—first, that the qualification as stated in the list was insufficient in law to entitle the said William Brisby to vote,—secondly, that the nature and description of the qualification in the list were insufficiently described, for the purpose of being identified,—thirdly, that the revising barrister had not power to amend the third column, by changing "tenant" into "farm, as occupying tenant;" and therefore that he was bound to expunge the name of the said William Brisby from the list of voters.

The revising barrister held,—first, that the word "tenant" was commonly understood as designating a tenant occupying at a rent,—secondly, that the qualification, as stated in the list, was sufficient in law,—thirdly, that the nature and description of the qualification were sufficiently described for the purpose of being identified, that is to say, that, by means of the entry in the copy register, and reasonable inquiry thereon, the actual qualification of the voter could be ascertained, and the particulars of the entry would then be found to be true; though the same were not sufficiently described so as to exclude every other qualification as occupying tenant in Newstead Grange than the actual qualification of the voter,—fourthly, that, at any rate, for the purpose of more clearly and accurately defining the qualification as it appeared in the list, he had power to amend the third column, by changing "tenant" into "farm, as occupying tenant."

At the request of the voter, the revising barrister amended the third column accordingly, and allowed the name of the said William Brisby to remain on the *list of voters settled by him, subject to the opinion of the Court of Common Pleas.

*14]

On the same list of voters, the rights of thirteen other persons whose names and qualifications were set out in a schedule annexed to the case, and on the list of voters for the borough of Tannanby revised at the same Court, the rights of ten persons whose names and qualifications were set out in another schedule, depended on like facts and findings, and were decided in the same manner and on the same points of law as the case of William Brisby; and in each case, at the request of the voter, the revising barrister amended the third column by changing "tenant" into "farm as occupying tenant," and he allowed the name of the voter to stand in the list. The cases were consolidated.

If the Court should be of opinion that the qualification of William Brisby as stated in the list as above described was sufficient in law, and that the revising barrister had power under the circumstances to amend the third column by changing "tenant" into "farm, as occupying tenant," the name of William Brisby and the thirteen names contained in the first schedule were to continue in the list of voters for the township of Thornton as settled by the revising barrister, and the ten names contained in the second schedule were to continue in the list of voters for the township of Tannanby.

If the Court should be of opinion that the said qualification as stated in the list was insufficient in law, or that the revising barrister had not power to amend the third column as aforesaid, the name of

William Brisby and the names contained in the two schedules were to be expunged from the lists of voters for the townships of Thornton and Tannanby respectively.

Welsby, for the appellant.—Two questions present themselves for decision in this case,—first, whether the qualification [*15 of William Brisby as stated on the register is sufficient to satisfy the statute,—secondly, if not, whether the revising barrister had power to amend the description under the 40th section of the 6 & 7 Vict. c. 18. 1. The qualification for a county voter must be either a 40*s.* freehold, a freehold or copyhold for life of the yearly value of 10*l.* (2 W. 4, c. 45, ss. 18, 19), or a sixty years' leasehold of the yearly value of 10*l.*, or a twenty years' leasehold of the yearly value of 50*l.*, or an *occupation as tenant* of lands or tenements at a yearly rent of not less than 50*l.* (s. 20). The word "tenant" is equally applicable to all these; or a man may be tenant of a farm without occupying it; but what is required here is *occupation*. The revising barrister has found that the word "tenant" was commonly understood as designating a tenant occupying at a rent: but, by whom understood, or whether as tenant for life or for an unexpired term, he does not condescend to say. The question is whether he could legally see that "tenant" was an inaccurate description of a 50*l.* occupier. 2. This was not a case for amendment. The 101st section of the 6 & 7 Vict. c. 18, is out of the question; for, that only applies where the inaccuracy is in a matter of mere form. The 40th section enacts, that, wherever the Christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any list, and the name of the occupying tenant thereof, shall be wholly omitted in any case where the same is by this Act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall, in the judgment of the *revising barrister, be insufficiently described for the purpose of being identified, such bar- [*16 rister shall expunge the name of every such person from such list, unless the matter or matters so insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list; provided that, whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, *except for the purpose of more clearly and accurately defining the same.* In Howitt, app., Stephens, resp., 5 C. B. N. S. 30 (E. C. L. R. vol. 94), in a list of claimants for a county, A.'s qualification was described in the third column as "50*l.* occupier," and in the fourth column the property was described as being situate in "Cambridge Road:" and this was held to be a sufficient description; but that, at all events, if insufficient, it was amendable under s. 40. But there, as Williams, J., observes, the claimant "did not, by asking the revising barrister to amend, seek to add a qualification, but he sought to give a more complete and accurate description of the qualification which was before insufficiently stated." Where, however, the description is no more applicable to the qualification sought to be

inserted than to any other, the power of amendment does not exist; we have no means of knowing what was the qualification that was meant. [Byles, J.—The revising barrister finds that the nature and description of the qualification were sufficiently described for the purpose of being identified.] That is to say, he goes on, "that, by means of the entry in the copy register, and *reasonable inquiry thereon*, the
*17] actual qualification of the voter could be ascertained, *and the particulars of the entry would be found to be true." What right has the objector to put the party to the trouble of inquiry? The Act only meant to give the revising barrister the power of amendment where he could see enough on the list to enable him to identify the qualification intended. [Williams, J.—The instances given in schedule H. No. 3 to the Reform Act show that it is enough to give a loose statement of the qualification.] No doubt, provided the qualification is described: but the question here is whether "tenant" coupled with the statement in the fourth column, can reasonably be said to point to an *occupation* as tenant. Suppose the statement had been "lessee for an unexpired term," it could hardly have been contended that in that case the revising barrister had power to amend.

Thomas Chitty, for the respondent.—"Tenant" sufficiently points to a qualification as occupier under the Chandos clause. Howitt, app., Stephens, resp., is precisely in point. The argument here, like that urged there, amounts to a special demurrer for ambiguity and want of particularity. The only use of the word "tenant" in s. 20 of the Reform Act, is, to describe a 50*l.* occupier. The principal difficulty which arose in Howitt, app., Stephens, resp., was, that the revising barrister had found as a matter of fact that the description was insufficient. Williams, J., in giving judgment, says: "The revising barrister appears to have considered that the qualification as stated was insufficient to entitle the claimant to vote. I am of opinion that he was mistaken in the conclusion to which he came. It seems to me to be impossible to doubt that the claimant meant to point to a qualification under what is commonly called Lord Chandos's clause, the 20th section of the Reform Act. I feel bound to say that I think it would
*18] be very mischievous if the *revising barrister were permitted to hold that the claimant is bound to describe the qualification in respect of which he claims to be registered in the terms which a lawyer would use; and that, in my opinion, it is sufficient if he describes it so that a man of ordinary sense could not mistake his meaning." In one of the cases, Maule, J., says that this Act was more especially made for the common people: the maxim, therefore, "Benigna faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat," would very properly apply here. In Webster's Dictionary, one of the definitions of the word "Tenant," is, "One who has the occupation or temporary possession of lands or tenements whose title is in another." Besides, the revising barrister has the exclusive power of determining whether the qualification is sufficiently described or not; and, where he holds it to be sufficient, the Court will not interfere: Wood, app., The Overseers of Willesden, resp., 2 C. B. 15, 1 Lutw. Reg. Cas. 314.

Erle, C. J.—The question in this case is, whether the revising barrister was right in making the description in the third column of the

list, headed "Nature of qualification," correct. By the Reform Act, 2 W. 4, c. 45, parties claiming to be on the register are required to state the nature of their qualification and its local situation, according to the form in the schedule H. No. 3. Under the third column, he is required to state, not the nature of the property, but the class to which it belongs. In the present case, the voter is described in the register as William Brisby, residing in the township of Thornton; in the third column the nature of his qualification is described as "Tenant," and in the fourth column, the local description of the property is stated to be "Newstead Grange." It was objected before the revising barrister, that "tenant" was not a sufficient description of the class of qualification within *the Reform Act. Now, the 20th section of the Reform Act specifies several classes of qualification in respect of [*19 which rights to vote shall be acquired,—"Every male person of full age, and not subject to any legal incapacity, who shall be entitled, either as lessee or assignee, to any lands or tenements, whether of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years (whether determinable on a life or lives or not), of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same, or for the unexpired residue, whatever it may be, of any term originally created for a period of not less than twenty years (whether determinable on a life or lives or not), of the clear yearly value of not less than 50*l.* over and above all rents and charges payable out of or in respect of the same,"—throughout this part of the section it will be observed that the words used are 'lessee or assignee;' it then goes on,—"or who shall occupy as *tenant* any lands or tenements for which he shall be bonâ fide liable to a yearly rent of not less than 50*l.*, shall be entitled to vote in the election of a knight or knights of the shire to serve in any future Parliament for the county, or for the riding, parts, or division of the county in which such lands or tenements shall be respectively situate." It is undoubtedly a very forcible argument upon that section, that, amongst all the classes of voters there mentioned, but one is described as "tenant." Here, the voter describes his class as "tenant:" and the question is whether that is sufficient, without showing that he is the *occupier* of lands or tenements for which he is liable to a yearly rent of 50*l.* The purpose of the Reform Act was to insure that none should vote who had not the substantial qualification pointed out; and *under the Registration Act, 6 & 7 [*20 Vict. c. 18, it is the duty of the revising barrister, to whom the legislature has intrusted the regulation of the lists, to see that a correct description of the qualification is to be collected from the words used. The revising barrister has collected from the statements in the third and fourth columns that the nature and description of the qualification was sufficiently described for the purpose of being identified, that is to say, that, by means of the entry in the copy register, and reasonable inquiry thereon, the actual qualification of the voter could be ascertained; and that, at all events, for the purpose of more clearly and accurately defining the qualification as it appeared in the list, he had power to amend, and he accordingly did amend, the third column, by changing "tenant" into "farm, as occupying tenant." Was he

right in so doing? It appears to me that it is in distinct accordance with the intention of the statute. The 40th section of the 6 & 7 Vict. c. 18, provides that "the revising barrister shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification as stated in any list shall be insufficient in law to entitle such person to vote;" and that, wherever the Christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted, in any case where the same is by that Act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or *the nature or description of his qualification, shall in the judgment of the revising barrister be insufficiently described for the purpose of being identified*, such barrister shall expunge the name of every such
*21] person from such *list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the name in such list." Here, the revising barrister was of opinion that "tenant" was commonly understood as designating a class, viz. a tenant occupying at a rent; but that, assuming the description to be insufficient, he had power to amend. I am strongly of opinion that he complied with the intention of the statute. If it be necessary to have recourse to the general power of amendment contained in the 101st section, the same principle is clearly made out,—"No misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this Act annexed, *or in any list or register of voters*, or in any notice required by this Act, shall in any wise prevent or abridge the operation of this Act with respect of such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood." I think the argument of great force, that, in common parlance, 50*l.* occupiers would class themselves as "tenants." The case of Howitt, app., Stephens, resp., 5 C. B. N. S. 30 (E. C. L. R. vol. 94), is a direct authority for what we are now doing. "Tenant" is a description more strictly in compliance with the statute than "50*l.* occupier." Furthermore, I think, upon the authority of Wood, app., The Overseers of Willesden, resp., 2 C. B. 15, 1 Lutw. Reg. Cas. 314, that this is almost entirely a matter within the province of the revising barrister. Questions of this sort are often sent up in order that the Court may intimate their views.

WILLIAMS, J.—I am entirely of the same opinion. As to the ob-
*22] jection that "tenant" is an insufficient *description of this person's qualification, because in legal acceptation the word "tenant" may mean tenant for life, or tenant in fee simple, or tenant in tail, it seems to me that that is met by the suggestion that "tenant" in the statute means one who holds under a landlord. It must be admitted that the description here omits the main essential to the qualification: it does not state that the party is *occupying* tenant; for, though he be a tenant holding under a landlord, he has no qualification as a voter unless he is occupying the premises. But the best answer to that is, that the statute, in the schedule H. No. 3, gives

examples; and, if the description given accords with those examples, that will be enough. Now, No. 3 gives as one of the examples, "50 acres of land as occupier," not saying that the occupation is as tenant. It may be that the party may hold 50 acres of land as occupier, and yet have no right to be upon the register: he may occupy as a trespasser or a disseiser. So, in the example immediately preceding,—"Lease of warehouse for years,"—it is not because a man holds under a lease for years that he is entitled to vote, but only where the clear yearly value of the premises is 10*l.* or 50*l.* as the case may be. It seems to me that the description here enables the revising barrister and all those who are interested to ascertain the nature and description of the qualification quite as effectually as the examples I have adverted to. Whether an objection be made or not, it is equally the duty of the revising barrister accurately to define the description of the qualification, if he conceives it to be insufficient or inaccurate; and in practice he does so. If I had been the revising barrister, I should have altered the description in this case into "occupying tenant of land of the yearly value of 50*l.*" The appeal must be dismissed.

*Byles, J.—I am of the same opinion. Perhaps the description of the qualification was well enough as it stood: but I think, at all events, the revising barrister was quite right in altering it as he did. The general rule for the construction of Acts of Parliament is, that the words are to be read in their popular, natural, and ordinary sense, giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe that they were not intended to bear that construction, because of some inconvenience which could not have been absent from the mind of the framers of the Act, which must arise from the giving them such large sense.(a) Surely that must especially be so with regard to an Act of Parliament which was intended for the enfranchisement of the kingdom: and still more when it is considered that many of these descriptions of qualification are given by illiterate persons. There can be no doubt that "tenant," in popular understanding, is one who holds or occupies under another person. I was much struck with the quotation made by Mr. *Chitty* from Webster's Dictionary, where one of the definitions given of "tenant" is, "One who has the occupation or temporary possession of lands or tenements whose title is in another." Suppose the voter here had said "I claim as having the occupation of land whose title is in another,"—would not that be equivalent to his saying "I claim as occupying tenant?" I do not entertain a doubt that the description was right as it originally stood: but at all events it is right now. [*23

Keating, J.—I also am of opinion that the conclusion of the revising barrister was quite right. The object of this statute, and more especially of this provision *in it, was, to enable a man's neighbours to ascertain by inquiry whether or not he has the qualification which appears on the register. It is impossible that any of this person's neighbours could for a moment doubt what was intended to be conveyed by the description of his qualification as "tenant." I am not surprised, therefore, that the revising barrister found, as he [*24

(a) See the cases collected and considered in Broom's Legal Maxims, 3d edit. 510 et seq.

did, that the nature and description of the qualification were sufficiently described for the purpose of being identified. If, therefore, any amendment at all was necessary, I think the amendment was properly made.

Chitty submitted, that, inasmuch as the decision of the Court affirming that of the revising barrister, was in support of the franchise, the respondent was entitled to his costs.

PER CURIAM. Decision affirmed, with costs.

No. 3. County of YORK.—North Riding.

JOHN BIRKS, Appellant; GEORGE ALLISON, Respondent.

DIXON'S Case.) *Nov.* 18.

One who occupied a farm of sufficient value to confer the franchise for a county, was described in the third column of the register as "tenant" and the local situation of the property was described in the fourth column as "Brock Lane." It appeared that the property the occupation of which constituted the qualification consisted of a farm-house in Brock Lane and of land elsewhere, but in the same township, which was always let with the farm-house. This description being objected to, the revising barrister amended, by altering that in the third column into "land, as occupying tenant," and that in the fourth column to "Brock Lane *and elsewhere in Thornton*:"—

The Court upheld his decision.

AT a Court held for the revision of the lists of voters for the north riding of Yorkshire, George Revis Dixon, whose name was on the list of voters for the township of Thornton, was duly objected to by John Birks.

*25] *The name of George Revis Dixon stood thus on the existing register:—

Thornton.

Christian name and surname.	Place of abode.	Nature of qualification.	Street, lane, &c., where property situate, &c.
George Revis Dixon.	Thornton.	Tenant.	Brock Lane.

It was proved that the voter was the occupying tenant of a farm in the township of Thornton; and that, apart from the question of sufficient registration, he had a good qualification in respect thereof. The *farm-house* was situate in Brock Lane, which is a lane in the village of Thornton, and with its curtilage was not of sufficient value to let for a yearly rent of 50*l.* Together with the farm-house, the voter occupied land at some distance from the farm-house, which was always let together with it, thereby constituting the farm for which the voter claimed to vote. The farm was known by no particular name, and, in the judgment of the revising barrister, would be best described for registration purposes as situate in "Brock Lane *and elsewhere in Thornton.*"

On behalf of the objector, it was contended,—first, that the qualification as stated in the list was insufficient in law to entitle the said

George Revis Dixon to vote,—secondly, that the nature and description of the qualification in the list were not sufficiently described for the purpose of being identified,—thirdly, that the revising barrister had not power to amend the third column, by changing "tenant" into "farm as occupying tenant,"—fourthly, that the revising barrister ought not to receive evidence of the voter occupying any property situate elsewhere than strictly in Brock Lane,—fifthly, that he had not power to amend the fourth column by changing "Brock Lane" into *"Brock Lane *and elsewhere in Thornton;*" and therefore that he was bound to expunge the name of George Revis Dixon from the list of voters. [*26

The revising barrister held,—first, that the word "tenant," as commonly understood, designated a tenant occupying at a rent,—secondly, that the qualification as stated in the list was sufficient in law,—thirdly, that he ought to receive evidence of the meaning of "Brock Lane," as used for the purpose of describing the local situation of the property,—fourthly, that, as commonly understood in Thornton, the description "Brock Lane" as the local description of a farm, designated a farm-house situate in Brock Lane, with land annexed, either immediately or not immediately contiguous thereto,—fifthly, that the nature and description of the qualification in the list were sufficiently described for the purpose of being identified; that is to say, that, by means of the entry in the copy register, and reasonable inquiry thereon, the actual qualification of the voter could be ascertained, and the particulars of the entry would be found to be true, though the same were not sufficiently described so as to exclude every other qualification as an occupying tenant in Brock Lane than the actual qualification of the voter,—sixthly, that, at any rate, for the purpose of more clearly and accurately defining the qualification as it appeared in the list, he had power to amend the third column by changing "tenant" into "farm as occupying tenant," and the fourth column by changing "Brock Lane" into "Brock Lane and elsewhere in Thornton."

At request made on behalf of the voter, the revising barrister amended the third column by changing "tenant" into "farm as occupying tenant," and the fourth column by changing "Brock Lane" into "Brock Lane and elsewhere in Thornton;" and he *allowed the name of George Revis Dixon to stand in the list of voters as settled, subject to the opinion of the Court. [*27

Similar amendments were made in the cases of four other voters whose cases were consolidated with the principal case.

If the Court should be of opinion that the qualification of George Revis Dixon as stated in the list was sufficient in law, and that, in the circumstances above stated, the revising barrister had power to amend the third column in the list by changing "tenant" into "farm as occupying tenant," and also the fourth column by changing "Brock Lane" into "Brock Lane and elsewhere in Thornton," the name of George Revis Dixon and those of the other four persons referred to were to stand in the respective lists.

If the Court should be of opinion that the qualification of George Revis Dixon as stated in the list, was insufficient in law, or that, in the circumstances above stated, the revising barrister had not power to amend the third and fourth columns as aforesaid, the name of George

Revis Dixon and those of the four other persons referred to were to be expunged from the respective lists.

Welsby, who appeared for the respondent, conceived the distinction between this and the preceding case to be so shadowy that he declined to argue it. The appeal, therefore, was in like manner dismissed.

Decision affirmed, with costs.

*28] *No. 4. Borough of MALDON.

WILLIAM DEVENISH, Appellant; GEORGE WYATT DIGBY, Town-Clerk of the Borough of MALDON, Respondent. *Nov.* 18.

***Quære*, whether obtaining medical attendance and medicine "on loan" from the guardians of a union, under the 58th section of the Poor Law Amendment Act, 4 & 5 W. 4, c. 76, is a receiving of parochial relief within the 36th section of the Reform Act?**

AT a Court held for the revision of the list of freemen of the borough of Maldon, William Devenish duly objected to the name of Samuel Polley being retained on the list of persons entitled to vote in the election of members of Parliament for the borough of Maldon in respect of his being a freeman of the said borough.

The facts were as follows:—Samuel Polley is a freeman of the borough of Maldon, and resides at Wickham Bishops, within the limits of the parliamentary borough. In March, 1862, his wife, having a swelling in her arm, and requiring medical attendance, went to the relieving officer, and applied for an order for the attendance of the medical officer of the union, and for the supply of medicine on account of the parish of Wickham Bishops. The relieving officer entered the application in the book of applications for out-door relief kept by him pursuant to the regulations of the poor-law board, and laid the same before the poor-law guardians at their next weekly meeting. The board granted the application, by way of loan, and the chairman of the board signed his initials, to signify that the application was granted, adding thereto the words "on loan." Upon the application being so granted, the relieving officer gave Mrs. Polley a written order to hand to the medical officer, which she took to the medical officer's surgery; and he supplied her with medicine to the value of 5*s*. The clerk to the board entered the application in his minute-book in the same way as he entered ordinary applications *29] *for relief, adding, as the result of the application, "granted on loan." A note of it was also entered in the loan-book kept by the clerk to the guardians pursuant to the orders of the poor-law board. About three weeks afterwards, the voter was applied to by the assistant overseer of the parish for the money, and the following week paid the amount, and received a receipt for it as follows:—

"No. 1. Witham Union. Parish of Wickham Bishops. The 1st day of April, 1862. Received of Mr. Samuel Polley the sum of 5*s*. on behalf of the above parish, in respect of loan (for medical relief).

"W. J. SPARKS, Assistant Overseer."

Upon these facts it was contended by the respondent that the said Samuel Polley, having received a loan from the parish under the 58th

section of the Poor-Law Amendment Act, 4 & 5 W. 4, c. 76,(*a*) had within twelve calendar months next previous to the last day of July in the present year received parochial relief or other alms, within the meaning of the 36th section of the Reform Act, 2 W. 4, c. 39, so as to disentitle him to be registered as a voter.

It was contended by the appellant, that, as the said Samuel Polley had before the said last day of July *repaid the said loan, he was not thereby disentitled from being registered as a voter. [*30

The revising barrister struck the name off the list, upon the ground that the granting of the loan under the 4 & 5 W. 4, c. 76, s. 58, was a granting of relief or other alms within the meaning of the 2 W. 4, c. 45, s. 36, notwithstanding the subsequent repayment.

If the Court should be of a contrary opinion, the said Samuel Polley's name was to be reinserted on the said register as a voter as aforesaid.

No one being instructed to support the appeal, the case was struck out.(*b*)

(*a*) That section enacts, "that, from and after the passing of this Act, any relief, or the cost-price thereof, which shall be given to or on account of any poor person above the age of twenty-one, or to his wife or any part of his family under the age of sixteen, and which the Commissioners shall by any rule, order, or regulation, declare or direct to be given or considered as given by way of loan, and whether any receipt for such relief, or engagement to repay the same, or the cost-price thereof, or any part thereof, shall have been given or not by the person to or on account of whom the same shall have been so given, shall be considered, and the same is hereby declared to be, a loan to such poor person."

(*b*) See Trotter, app., Trevor, resp., post, p. 48.

No. 5. County of YORK.—North Riding.

WILLIAM DALE TROTTER, Appellant; WILLIAM WALKER, Respondent.

(AYLAN'S Case.) *Nov.* 18.

A notice of objection signed by the objector, "Leonard Sedgwick, Fencote Hall," was delivered to the party objected to: but, the *surname* of the objector (being in his usual mode of signing) was not legible by an ordinary person, though such a person might, as the revising barrister found, by comparison of the notice of objection with the entry of the objector's name, description, and qualification in the register, have understood it: the *Christian name* and *place of abode* were legible. The revising barrister having held the notice of objection insufficient, —The Court reversed his decision.

AT a Court held at Middlesborough, to revise the lists of voters for the north riding of Yorkshire, Leonard Sedgwick objected to Thomas Aylan, whose name was upon the list of voters for the township of Middlesborough.

To prove service of a due notice of objection on the voter, a duplicate notice, duly stamped by the post-office, was put in evidence. The said duplicate notice purported to be in the statutory form, and was in all *respects sufficient, save as follows:—In the place where the name of the objector is appointed to be written, it bore a written [*31 signature, under which there were, partly in print and partly in legible writing, these words,—"(*Place of abode*) Fencote Hall, Bedale, on the register of voters for the parish of Kirby Fleetham."

The said signature consisted of two parts, the first purporting to designate the first or Christian name of the objector, and the second his surname. The first part the revising barrister held was legible as "Leonard." The second part he held was wholly illegible,—that is to say, that an ordinary person, unacquainted with the signature, could not by perusing it with ordinary diligence and skill arrive at any reasonable conclusion what name the second part thereof was intended to designate.

In the register of voters for Kirby Fleetham, which contained thirty-three names, there was the following entry:—

Christian name and surname, &c.	Place of abode.	Nature of qualification.	Street, &c., where property situate, &c.
Sedgwick, Leonard, M.A.	Fencote Hall.	Freehold house and land.	The Hall.

Fencote Hall was not assigned as a place of abode to any other voter on the register of voters for Kirby Fleetham; and it was in fact the residence of Mr. Sedgwick, who was a magistrate for the said north riding.

The revising barrister held that an ordinary person, if guided to the said entry in the register by the description of the objector in the duplicate notice of objection, might by comparing the signature of
*32] the said duplicate notice with the entry reasonably infer *that the signature was intended to mean "Leonard Sedgwick."

It was proved that the signature to the duplicate notice was in fact the handwriting of the objector, and was his ordinary signature, and was intended by him to mean "Leonard Sedgwick."*

On the part of the voter, no evidence was given that he had not in fact received the document sent to him by the objector through the post-office. But there was no evidence that he *had* received the same, except the duplicate notice aforesaid.

On behalf of the voter, it was contended that the duplicate notice of objection was not signed according to the requirements of the 7th section of the Registration Act, 6 & 7 Vict. c. 18; and that service of a due notice of objection was not proved.

On behalf of the objector, it was contended,—first, that it was to be inferred that the notice of objection was signed with the same name as the duplicate, but not necessarily in the identical manner; and that the presumption was that the signature of the notice of objection was legible,—secondly, that, assuming the signature of the notice of objection to have been in part wholly illegible as that of the duplicate, it was nevertheless sufficient, as being the usual signature of the objector, —thirdly, that, assuming the signature of the notice of objection, read by itself, to have been in part wholly illegible as that of the duplicate, yet, read together with the aforesaid entry in the register, it was legible and sufficient.

The revising barrister held,—first, as a matter of fact, that the document received from the objector by the post-office for transmission to the voter was received by him on or before the 25th of August, 1862

—secondly, that the notice of objection ought to be presumed in law and in fact to have corresponded as to *manner of signature with [*33
the duplicate, and therefore that the signature thereto was as to the second part thereof wholly illegible,—thirdly, that the signature of the notice of objection and duplicate notice of objection ought to be considered apart from the register,—fourthly, that a notice of objection so signed as aforesaid was not signed according to the requirement of the statute. He therefore allowed the name of Thomas Aylan to stand in the list of voters settled by him, subject to the opinion of the Court on this case.

The revising barrister then called on Thomas Aylan to prove his qualification; and it was admitted on his behalf that he had no qualification.

The rights of thirteen other voters in the same list, whose names were contained in a schedule annexed to the case, depended upon the same facts and findings, and were decided by the revising barrister in the same manner and upon the same points of law as the case of Thomas Aylan; and he allowed the said thirteen names to stand on the list, subject to the opinion of the Court. In each case, the revising barrister called upon the voter to prove his qualification; and it was admitted that in fact he had no qualification. The appeals were consolidated.

If the Court should be of opinion, that, in the circumstances above stated, the signature of the notice of objection served on Thomas Aylan was to be presumed in law to have been in part wholly illegible as aforesaid, or was a matter of fact for the determination of the revising barrister, and should be also of opinion that the said notice of objection was insufficient, and ought not to have been considered good by reason of the entry aforesaid in the register, the name of Thomas Aylan and the thirteen names contained in the schedule were to stand in the list of voters as settled by the revising barrister.

*If the Court should be of opinion, that, in the circumstances [*34
stated, the signature of the notice of objection was to be presumed in law to have been legible; or if the Court should be of opinion that the notice of objection being signed in part wholly illegibly as aforesaid was sufficient, or ought to have been considered good by reason of the entry aforesaid in the register, the name of Thomas Aylan and those of the thirteen persons contained in the schedule were to be expunged from the said list of voters.

Thomas Chitty, for the appellant.—The revising barrister in this case held that the notice of objection was insufficient by reason of the illegibility of the objector's *surname*, although it was proved that the signature was in fact the handwriting of the objector, and was his ordinary signature, and was intended by him to mean "Leonard Sedgwick," and the Christian name and place of abode were legible. The statute requires (by s. 7) the notice of objection to be "signed by the party objecting." There is nothing in the statute to require the signature to be affixed in any other than the ordinary way. [WILLIAMS, J.—How would it be in the case of a marksman?] Any mark intimating the assent of the party would suffice, under the Statute of Frauds.(a) [ERLE, C. J.—The signature here would no doubt be

(a) See Hyde v. Johnson, 3 Scott 289 (E. C. L. R. vol. 36), 2 N. C. 776 (E. C. L. R. vol. 29.) and see the judgment of Lord Ellenborough in Schneider v. Norris, 2 M. & Selw. 285.

enough to bind the party to a contract or a promissory note or bill of exchange. But these notices are intended to convey information: see the judgment of Maule, J., in Eidsforth, app., Farrer, resp., 4 C. B. 9 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 517.] That learned judge, it is well known, entertained a very strong view of the requirements
*35] of this statute: see *his judgment in Knowles, app., Brooking, resp., 2 C. B. 226 (E. C. L. R. vol. 52), 1 Lutw. 461. [BYLES, J.—The revising barrister does not find that the identity of the party whose signature purported to be to the paper could not have been discovered by using a little more care than usual. For anything that appears, it may have been a signature which was perfectly familiar both to the objectee and to the overseers.] In Toms, app., Cuming, resp., 8 Scott N. R. 910, 917, 7 M. & G. 88 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 200, Maule, J., says: "The term *signing* means *marking in some way* by the party himself." [WILLIAMS, J.—In Baker *v.* Dening, 8 Ad. & E. 94 (E. C. L. R. vol. 35), 3 N. & P. 228 (nom. Taylor *v.* Dening), it was held, that, under the Statute of Frauds, 29 Car. 2, c. 3, ss. 5, 6, the making of a mark by the devisor to a will of real estate, is a sufficient signing; and it is not necessary to prove that he could not write his name at the time.] In Johnson's Dictionary, "signature" is defined to be "a sign or mark impressed upon any thing." So, in Webster, "a sign, stamp, or mark impressed."(*a*) In the case of a notice of claim, unless the signature were legibly written, the overseers could not insert the party's name in the list. The statute 5 & 6 W. 4, c. 76, s. 32, directs the mode of voting in municipal elections to be by delivery of a voting-paper, "such paper being previously signed with the name of the burgess voting:" and in The Queen *v.* Avery, 18 Q. B. 576 (E. C. L. R. vol. 83), a question arose whether a signature with initials for the Christian names of the parties, was a compliance with the statute. Lord Campbell there says: "We must give the Act that interpretation which would be put upon it by any person reading it according to the grammatical construction and the ordinary force of the words. The requisition is
*36] that the paper be 'signed,' *that is, by the voter or some person for him: and, what is intended to be the signing? Clearly, that it should be done in the ordinary mode in which he signs his name: and here we must take that ordinary mode to be, writing the surname in full, and denoting the Christian name by an initial. A testator may sign in this form; and it is allowed in executing deeds, and in subscribing the written instruments required by the Statute of Frauds." "In some cases," his Lordship continues, "the legislature expressly requires both Christian and surnames to be written at full length" (as is the case in the forms given in the 6 & 7 Vict. c. 18); "and, when that direction is for some reason introduced, it must be complied with. Here, no such direction is given, either expressly or by reference to any form as a model." The signature here, it is submitted, is, upon the finding of the revising barrister, abundantly sufficient.

Welsby, for the respondent.—No doubt, a signature by initial or even by a mark may constitute a very good acknowledgment under the Statute of Frauds, or may bind a party to a contract. But the question here is whether a signature which nobody can read is a suffi-

(*a*) And see Bouvier's Law Dictionary (American), and Burrel's Law Dictionary (American), verb. "Signature."

cient signature under this statute. What are the findings here? That the Christian name of the objector was legible, but the surname was *wholly illegible*, that is to say, that an ordinary person, unacquainted with the signature, could not by perusing it with ordinary diligence and skill arrive at any reasonable conclusion what name was intended to be designated. The revising barrister further goes on to state that an ordinary person might by comparing the signature of the duplicate notice with the entry in the register infer that the signature was intended to mean Leonard Sedgwick. But the party is not bound to look beyond *the notice. He must be able reasonably to gather from that who is the objector and whence he comes. He further says it was proved that the signature was the handwriting of the objector, and was his ordinary signature. But there was no proof or suggestion that this was known to the voter or to anybody else, except perhaps to the objector himself or his banker. The case of Woollett, app., Davis, resp., 4 C. B. 115 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 607, is an authority to show that an imperfect description in a notice of objection cannot be aided by a reference to the list of voters. It might have been said there that very possibly the voter knew the objector; but the Court said that he was not bound to import any knowledge of his own, or to resort to other sources than the document itself, in order to obtain the necessary information. [KEATING, J.—There the decision was that the notice did not comply with the statute.] What is a "signature" under this Act? Obviously one which tells the party who his objector is. Is this such a signature as the overseers could reasonably be expected to act upon? The "signature" of a marksman imposes no difficulty; for, in that case, there must be an attestation disclosing his Christian and surname. In The Queen *v.* Bradley, 7 Jurist N. S. 157, "Wm." was held to be a sufficient indication of a voter's Christian name in a municipal election voting-paper; but "W." alone was held insufficient. If an illegible name will do in a case of this sort, an illegible place of abode will also; and thus the greatest confusion and uncertainty will be introduced in a matter which of all others should be left free from doubt. [*37

Chitty, in reply.—There can be no reason why in a case of this sort a party should not consider that his ordinary signature would be a compliance with the statute. [WILLIAMS, J.—Suppose the signature *accidentally blotted at the time of writing so as to be altogether illegible, do you say that the party would not be bound to write it over again?] It may be in that case that the law would consider that no signature at all. But that differs essentially from this case. [*38

Cur. adv. vult.

ERLE, C. J., on a subsequent day, delivered the judgment of the Court:—

On the register of county voters for Kirby Fleetham in the preceding year was the following entry,—

Christian name and surname, &c.	Place of abode.	Nature of qualification.	Street, &c., where property situate, &c.
Sedgwick, Leonard, M.A.	Fencote Hall.	Freehold house and land.	The Hall.

A notice of objection signed by the objector, "Leonard Sedgwick, Fencote Hall," was delivered to the party objected to. But the surname of the objector, being in his usual mode of signing, was not legible by an ordinary person, though such a person might, by comparison of the notice of objection with the above entry in the register, have understood it. The Christian name and place of abode were legible.

The revising barrister held the notice of objection insufficient; but we think it will suffice.

If the sole object of the statute was merely to authenticate the document, the signature was undoubtedly sufficient. It was the objector's ordinary signature, upon which he would have been liable had the document been a contract or a promissory note. And, even if the object of the statute in requiring a signature, was, to inform the party who received the notice, and to inform the revising barrister, who
*39] *the objector was, we still think the signature sufficient.

The revising barrister does not find that the surname was absolutely illegible, but only that an ordinary person unacquainted with the signature could not by ordinary diligence, without referring to the register or other extraneous assistance, decipher the surname. It is quite consistent with this finding that the party receiving the notice, and every man in the parish, was familiar with the signature, and could recognise the surname at once, especially when read in connection with the *Christian name* and the objector's place of abode, "*Fencote Hall*," both of which were legibly written. The revising barrister himself does not appear to have experienced any difficulty in ascertaining whose signature it was.

But, further, assuming that the statute requires the objector to give by his signature due information to the party receiving the notice, or to the revising barrister, it hardly requires that he should certainly succeed in so doing, but only that he should use for that purpose a due degree of care. And in this case we cannot say that a due degree of care (whether it had been successful or not) was not used.

Lastly, it is one thing to say that the statute enjoins a legible signature, and another thing to say that such legibility is a condition precedent to the validity of the notice.

Were we to hold this notice bad, questions would arise on the notice or claim of every man who might have written his name very badly or spelt it incorrectly. The object of the Act of Parliament, which calls to its aid persons of very imperfect education, might be defeated by adopting a rigorous construction, and furthered by a more benignant one.

*40] Cases of fraud stand on their own ground. And *cases of utter illegibility, of the objector's inability to write his own name, and of the total absence of signature, admit of other considerations: and we desire to give no opinion upon them.

Decision reversed.

No. 6. County of YORK.—North Riding.

WILLIAM DALE TROTTER, Appellant; WILLIAM WALKER Respondent (HALLAM'S Case). *Nov.* 18.

See the head note to preceding case.

AT a Court held at Middlesborough to revise the lists of voters for the north riding of Yorkshire, Leonard Sedgwick objected to Alfred Hallam, whose name was on the list of voters for the township of Middlesborough.

To prove service of a due notice of objection on the voter, a *duplicate notice*, duly stamped as of due date by the post-office, was put in evidence; whereupon, *on behalf of the voter, the notice served upon him through the post-office, and marked with the same stamp as the duplicate, was produced;* and the revising barrister held that it was the notice of objection sent by the objector, and that it was served in sufficient time.

The said notice purported to be in the statutory form, and was in all respects sufficient, save as follows:—[The facts were here set out precisely as in No. 5, antè, p. 30, down to the asterisk at p. 32.]

The duplicate notice of objection was signed in the like imperfect manner.

On behalf of the voter, the case of Woollett, app., Davis, resp., 4 C. B. 115 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 607, was cited; and it was contended that the notice of objection served upon him was not sufficient.

*On behalf of the objector, it was contended,—first, that the signature of the notice of objection, being the usual signature of the objector, was sufficient,—secondly, that the signature, being legible when read with the entry in the register, was sufficient. [*41

The revising barrister held that the notice of objection was to be read by itself, and not with the register, and, so read by itself, was insufficient. He accordingly allowed the name of Alfred Hallam to stand in the list of voters settled by him, subject to the opinion of the Court on this case.

The revising barrister then called upon Alfred Hallam to prove his qualification; when it was admitted that in fact he had not a qualification.

The rights of four other voters on the same list depended on the like facts and findings; and the revising barrister decided each of the said cases in the same manner and on the same points of law as the case of Alfred Hallam, and he allowed all the names to stand in the list of voters, subject to the opinion of the Court. In each case he also called on the voter to prove his qualification, and it was admitted that in fact he had no qualification. The appeals were consolidated.

If the Court should be of opinion, that, in the circumstances above stated, the notice of objection served on Alfred Hallam was sufficient, the names of Alfred Hallam and the four other persons above mentioned were to be expunged from the list of voters for the township of Middlesborough.

If the Court should be of opinion that the said notice of objection

was not sufficient, the said names were to stand in the said list as settled.

Welsby, for the appellant.—There is no substantial difference between this and the preceding case.

*42] *Burke* appeared for the respondent.

ERLE, C. J.—The facts of this case were the same as those of Trotter, app., Walker, resp. (Aylan's Case), antè, p. 30, except that the fault was in the notice served on the voter. The decision, therefore, will in like manner be reversed. Decision reversed.

No. 7. County of YORK.—North Riding.

LEONARD SEDGWICK, Appellant; THOMAS TUDOR TREVOR, Respondent. *Nov.* 18.

See the head note antè, p. 30.

AT a Court held at Gisborough, to revise the lists of voters for the north riding of the county of York, Leonard Sedgwick objected to Robert Clark, whose name was on the list of voters for the township of Redcar.

The service of a due notice of objection on the voter being disputed, the notice served on the voter was produced on his behalf, and it was proved that the notice was served on him in due time. The said notice purported to be in the statutory form, and was admitted to be in all respects sufficient, save as follows:—

In the form of notice of objection to be served on the voter, given in Sched. A. No. 5, of the Registration Act, 6 & 7 Vict. c. 18, the concluding words are,—"(Signed) A. B. of [*place of abode*], on the register of voters for the parish of ——." The notice served bore, in the place where the name of the objector is appointed to be signed, a written signature consisting of two parts, the first part purporting

*43] to be the Christian *or first name of the objector, and the second part his surname. The first part of the signature the revising barrister held was legible as "Leonard:" the second he held was wholly illegible, that is to say, an ordinary person unacquainted with the signature could not by perusing the signature with ordinary skill and diligence arrive at any reasonable conclusion what name the second part of the signature was intended to designate. Underneath the signature in the notice came, in print, the words "place of abode," which were followed by a writing consisting of two parts, the first of which the revising barrister held was wholly illegible; the second was legible as "Hall." Underneath this writing followed, either in print or legible writing, the words "on the register of voters for the parish of Kirby Fleetham." Instead of the word "parish," the word "township" had originally stood (as above indicated); but "township" had been struck through by a stroke of the objector's pen, and "parish" written over it. The word "township," though struck through, was still legible.

In the register of votes for the north riding, of the Northallerton polling district, there is a heading "Kirby Fleetham," followed by a

list of thirty-three voters, with their places of abode and qualifications; amongst which was the following:—

Christian name and surname, &c.	Place of abode.	Nature of qualification.	Street, &c., where property situate, &c.
Sedgwick, Leonard, M.A.	Fencote Hall.	Freehold house and land.	The Hall.

In the table of contents prefixed to the volume containing the entire register for the said north riding, which the revising barrister held was not required by the provisions of the 47th section of the Registration *Act, and did not form part of the register, is the following entry,— [*44

"Northallerton Polling District.

"Townships. Amderby Myers with Holtby, p. 99."

[Underneath this name follow a column of names of other places, amongst which is]

"Kirby Fleetham with Fencote, p. 108."

The said table of contents designates in manner above described all the places therein contained as townships, though many of them are in fact not townships but parishes.

After the said table of contents in the said volume is printed an order of the general quarter sessions of the north riding, which the revising barrister held not to form part of the register. A copy of the volume containing the entire register for the north riding of Yorkshire was annexed to and formed part of the case.

It was proved that the signature to the notice of objection was the handwriting of the objector, and was intended by him to designate "Leonard Sedgwick." There was no evidence that the voter was acquainted with the signature. It was also proved that the writing in the notice of objection after the words "place of abode," was in the usual handwriting of the objector, and was intended by him to designate Fencote Hall; and that Fencote Hall was in fact his true place of abode. No evidence was offered to show whether Kirby Fleetham was a parish or a township.

The revising barrister held, as a matter of fact, that any ordinary person, if guided to the said entry in the register for Kirby Fleetham by the legible part of the notice of objection, might, by comparing the two documents together, reasonably infer that the signature to the notice of objection was intended to designate "Leonard Sedgwick," and that the written place of abode was intended to designate "Fencote Hall."

*On behalf of the voter, it was contended,—first, that the notice of objection ought to be read by itself, and not with the register,—secondly, that, so read without the register, it was insufficient, in consequence of the objector's signature being in part wholly illegible as aforesaid,—thirdly, that, so read without the register, the notice of objection was insufficient, as not stating in a legible form the objector's place of abode,—fourthly, that the notice of objection was bad, as there was no such register as the register of voters for the [*45

parish of Kirby Fleetham, and that the true registration of the objector was not given.

On behalf of the objector, it was contended,—first, that the signature to the notice of objection being the usual signature of the objector, the notice was signed according to the requirement of the statute, notwithstanding the signature was in part wholly illegible as aforesaid,—secondly, that the objector's true place of abode, being stated in the objector's usual handwriting, was sufficiently stated, notwithstanding the writing thereof was in part wholly illegible as aforesaid,—thirdly, that the statement in the notice of objection, of the objector's registration, was a sufficient statement thereof,—fourthly, that the notice of objection ought to be read together with the register, and, so read, showed the name of the objector and his true place of abode.

The revising barrister held,—first, that the statement in the notice of objection of the objector's registration was a sufficient statement thereof,—secondly, that the notice of objection ought to be read by itself, and not with the register, and that, so read by itself, it was not signed according to the requirement of the statute, because the signature was in part wholly illegible as aforesaid; and that, so read by itself, it did not duly state the objector's place of abode, be-
*46] cause *the word preceding the word "Hall" was wholly illegible as aforesaid: and he accordingly held that the notice required by the Act to be given by the objector had not been given.

The revising barrister then allowed the name of the voter to stand in the list of voters settled by him. The objector forthwith gave notice of his desire to appeal from the decision, and his appeal was allowed.

The revising barrister then, for the purposes of the appeal, forthwith called upon the voter to prove his qualification; but he declined to do so, alleging that the question of due notice of objection having been given or not was a question of fact for the revising barrister's decision, from which no appeal should have been allowed; and that, as the revising barrister had decided that the objector had not given the notice required by the Act, the voter ought not under the 40th section of the Act to be required to give any proof of his qualification. The revising barrister then warned the voter, that, if he did not prove his qualification, he should leave his name to be struck out of the list of voters, if the Court of Common Pleas should be of opinion that the notice of objection served on him was sufficient. The voter persisted in declining to prove his qualification.

The rights of four other voters on the same list depended on the like facts and findings, and were decided by the revising barrister in all respects in the same manner and on the same points of law as the case of Robert Clark. In each case the voter was called upon to prove his qualification: and in each case the voter, though warned as Robert Clark had been warned, declined, on the same ground as that on which Robert Clark declined, to prove his qualification. The revising barrister allowed the names of these four last-mentioned
*47] persons to stand in the list of voters *settled by him, and ordered the appeals to be consolidated.

If the Court should be of opinion that the notice of objection served

on Robert Clark was in the circumstances above stated sufficient, the name of Robert Clark and the names of the other four persons were to be expunged from the list of voters for the township of Redcar.

If the Court should be of opinion that the notice of objection served on Robert Clark was in the circumstances above stated insufficient, the said names were to stand in the said list as settled.

Burke, for the appellant.—The facts of this case are substantially the same as those in Trotter, app., Walker, resp. (Aylan's Case), antè, p. 30, except that a portion of the description of the objector's place of abode was also wholly illegible. Now, the legibility or illegibility of the notice was a question of fact for the revising barrister to decide; for, what may be illegible to one person may be perfectly legible to another: and here the revising barrister has by his finding disposed of that question.

Welsby, for the respondent.—There is no distinction that is at all appreciable between this and the last two cases. The decision, therefore, must necessarily be the same.

ERLE, C. J.—This case was in substance the same as that of Trotter, app., Walker, resp. (Aylan's Case), antè, p. 30, except that, in the description of the objector's place of abode, the word "Fencote" was also illegible in the same degree. We think this additional fact carries the case no further. Decision reversed.

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*No. 8. Borough of NORTHALLERTON. [*48

WILLIAM DALE TROTTER, Appellant; THOMAS TUDOR TREVOR, Respondent. *Nov.* 18.

A.'s father becoming chargeable to the parish, A. was called upon by the guardians to contribute towards his support, and it was arranged that he should pay (and he did pay) to the parish officers 1s. 6d. per week so long as his father remained chargeable. The sum so paid did not suffice to maintain the father; and accordingly it was contended that the excess was in effect a receipt of parochial relief by A. within the 36th section of the Reform Act, and disqualified him to be upon the register:—Held,—affirming the decision of the revising barrister, —that A. was not disqualified.

AT a Court held for the revision of the lists of voters for the borough of Northallerton, Matthew Shaw, whose name was on the list of voters for the borough in respect of property occupied in the township of Northallerton, was duly objected to; and it was then proved that his qualification as a voter for the borough was good, if he was not disqualified by the provisions of the 36th section of the Reform Act, 2 W. 4, c. 45, which enacts that "no person shall be entitled to be registered in any year as a voter in the election of a member or members to serve in any future Parliament for any city or borough, who shall within twelve calendar months next previous to the last day of July in such year have received parochial relief or other alms, which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament."

The facts of the case were these:—From the 31st of July, 1861, to the 31st of July, 1862, Matthew Shaw was resident within the township of Northallerton. In November, 1861, his father, being then old

and destitute and unable to work, became chargeable as a pauper to the common fund of the Northallerton Union, applied for relief to the board of guardians of the said union, and received an order from them to go into the Northallerton Union Workhouse. He accordingly became an inmate of the said workhouse for six weeks. Whilst he was in the workhouse, his son Matthew Shaw, the voter, upon the request of the relieving officer of the said union, came to a meeting
*49] *of the board of guardians, and was then told by the board of guardians, that, if he did not pay something towards the maintenance of his father, he the said Matthew Shaw would be summoned before the justices in petty sessions to show cause why he should not be ordered to maintain his father.

As a matter of practice, the guardians instruct the proper officer to summon before the justices in petty sessions any person liable to contribute to the maintenance of a pauper within the district of the union.

Matthew Shaw thereupon made an offer to pay 1*s.* 6*d.* weekly towards the maintenance of his father whilst he continued in the workhouse; and the guardians accepted the offer. Matthew Shaw accordingly paid the sum of 1*s.* 6*d.* for several weeks whilst his father was in the workhouse: but this sum was insufficient to defray the expense of his father's maintenance; and the residue of the expense was paid in the usual manner out of the common fund of the union. No order was made by the justices requiring Matthew Shaw to contribute to the maintenance of his father; nor was it proved that Matthew Shaw was able to contribute thereto beyond the said weekly sum of 1*s.* 6*d.*

On behalf of the objector, the following statutes,—43 Eliz. c. 2, s. 7, 59 G. 3, c. 12, s. 26, 5 G. 4, c. 83, s. 3, and 4 & 5 W. 4, c. 76, s. 56, —were cited, and also Rogers on Elections, 5th edit., p. 169 et seq.: and it was argued that Matthew Shaw was in the circumstances legally bound to maintain his father, and that the father having received parochial assistance during the twelve months preceding the 31st of July, 1862, Matthew Shaw was disqualified as a voter for the borough.
*50] On the other side, it was argued that Matthew Shaw *was not disqualified by the provisions of the 36th section of the Reform Act.

The revising barrister concurred in this latter view, and he accordingly retained the name of Matthew Shaw on the list of voters, subject to the opinion of the Court.

If the Court should be of opinion, that, in the circumstances above stated, Matthew Shaw was disqualified as a voter for the borough of Northallerton, the name of Matthew Shaw was to be expunged from the list of voters. If the Court should be of opinion that he was not so disqualified, his name was to stand in the list.

Thomas Chitty, for the appellant, submitted that the voter was disqualified; for that, being by law bound to maintain his father, if of ability,—which must be assumed, the contrary not having been proved, —the difference between the sum which he paid to the parish and the actual cost to the parish of his father's maintenance, was in effect so much parochial relief received by the voter himself.

Erle, C. J.—I am clearly of opinion that the decision of the revising

barrister in this case was right. I see nothing in the 36th section of the Reform Act to disqualify the voter. He is supporting himself by honest industry. His father, being old and destitute and unable to work, becomes for a time an inmate of the workhouse, and the guardians of the union call upon the son to pay something towards his maintenance, and they assess the amount at 1*s.* 6*d.* per week, which is duly paid by the son. It is said, that, because the support of the pauper cost the parish funds more than the sum so paid, the excess must be considered as parochial relief given to the son, inasmuch as it *relieved him from a burthen which was cast upon him by the law. I cannot concur in that view. [*51

The rest of the Court concurring,

Decision affirmed, with costs.(*a*)

(*a*) In Mashiter, app., Dunn, resp., 6 C. B. 30 (E. C. L. R. vol. 60), 2 Lutw. Reg. Cas. 112, it was held that a freeman who has within the year been excused from paying a poor-rate, under the 5 G. 3, c. 170, s. 11, upon proof before the justices of inability through poverty to pay such rate, is not disqualified from being registered, as having "received parochial relief," within the 2 W. 4, c. 45, s. 36. "The words of disqualification in that section," said Coltman, J., "are not to be strained so as to narrow the franchise, the extension of which is to be favoured rather than otherwise. There is a substantial difference between the *receipt* of parochial relief and the being excused, by reason of inability, from bearing a parochial *burthen*." And Maule, J., said: "This person did not receive parochial relief by simply being excused from contributing to the rate, any more than I could be said to *receive* relief from a beggar by declining to give *him* relief."

END OF THE REGISTRATION CASES.

*MACKELCAN *v.* RENNIE and Others. *Nov.* 7. [*52

In construing a specification, it is not competent to the inventor to pray in aid the provisional specification in order to explain or enlarge the meaning of the complete specification.

Whether the application in the construction of a known machine of a material never before used for that purpose,—for instance, *iron* instead of *timber* in the construction of floating-docks,—can properly be the subject of a patent,—*quære*.

THIS was an action for an alleged infringement of the plaintiff's patent for "Improvements in Floating-Docks." The pleadings were in the common form.

The cause was tried before Erle, C. J., at the sittings at Guildhall after the last Term. The plaintiff put in the letters patent, dated the 8th of September, 1857, the provisional specification, of the same date, and the complete specification, bearing date the 8th of March, 1858.

The provisional specification was as follows:—"I, George Josiah Mackelcan, of, &c., engineer, do hereby declare the nature of the said invention for 'Improvements in Floating-Docks,' to be as follows:—

"I so construct a floating-dock or ship-lift that it may be sunk to the bottom of the water, or to any depth necessary to receive a ship, and may then be caused to float or rise until the ship is lifted out of the water.

"For this purpose, I construct a pontoon or vessel of iron framing, sheeted over entirely with plate-iron, so as to form an air-tight and water-tight chamber: this chamber is subdivided laterally into com-

partments or separate chambers, air and water tight, or it may consist of separate pontoons united together by a common deck or platform, as in the Liverpool landing-stages; these chambers or pontoons, or any of them, being filled or partially filled with water or air at pleasure, will cause the dock to sink or float, with any required degree of buoyancy. These chambers or any of them are filled with water by suitable valves, and emptied by pumping out the water, or by displacing
*53] the water through the forcible introduction of air. Upon the *deck of this vessel I erect a row of tubes or hollow columns along each side, open to the chambers beneath, of a greater height than the draught of the ship to be docked, so that they are never entirely submerged: the upper ends of these tubes or columns carry a platform or path along each side of the dock, and of its whole length; these platforms are a guide for getting a ship into position when the pontoon is submerged, and also sustain temporary shores, until the dock or platform on which the ship rests is above water: through these tubes or columns the chambers are filled with air and emptied of water. The platforms or paths above referred to may be constructed of timbers or may be hollow chests or cylinders of iron, and made to serve as floats to the dock, or to hold compressed air, which may be admitted at pleasure through the columns to the chambers of the pontoons, thus to empty them of water by expulsion: these stages or paths will also afford the means of attaching awnings, stretched from the bulwarks of the ship, to protect the workmen from rain and sun in tropical seas, or where desirable. In a tide-way the dock may be grounded, and the ship placed in position and shored; and when left by the receding tide, the water may be let out of the chambers by valves or scuttles: the dock will then, on the return of the tide, float with its burthen.

"This dock or lift may be constructed without the upright tubes or floats; in which case some of the chambers will remain permanently filled with air, as a counterpoise to the specific gravity of the dock, and the others be emptied of water, and filled with air by flexible tubes."

The complete specification was as follows:—

"Whereas, Her most excellent Majesty Queen Victoria, by Her letters patent, bearing date, &c., did, for herself, her heirs and successors,
*54] give and grant unto *me, the said George Josiah Mackelcan, Her special license that I, the said George Josiah Mackelcan, my executors, administrators, and assigns, or such others as I the said George Josiah Mackelcan, my executors, administrators, and assigns, should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should and lawfully might make, use, exercise, and vend within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, an invention for 'Improvements in Floating-Docks,' upon the condition (amongst others) that I the said George Josiah Mackelcan, my executors or administrators, by an instrument in writing under my or their or one of their hands and seals, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in

the Great Seal patent office within six months next and immediately after the date of the said letters patent.

"Now know ye that I, the said George Josiah Mackelcan, do hereby declare the nature of my said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement, that is to say,—

"Having in a provisional specification described the nature of my invention, I will now proceed particularly to describe the same, referring for that purpose to the accompanying diagrams.

"The principle embodied in my invention is that of buoyancy; not the buoyancy of a basin or open vessel, which exists only so long as it remains partially above water, and arises, under such circumstances, from its capacity being greater than its displacement; but that of an air-tight and water-tight chamber, which may be entirely submerged by pressure, and yet perfectly *retain its buoyancy, or *may be caused to sink by being filled, when, on being again emptied, it will recover its normal condition,* as stated in my provisional specification,—'being filled or partially filled with air or water at pleasure, will sink or float with any required degree of buoyancy,'—*the power of flotation being wholly dependent upon the substitution of air for water within it;* as, for instance, if a given quantity of water be removed from a submerged chamber or pontoon, it will lift and sustain an equivalent superincumbent weight: therefore, many chambers or pontoons arranged together, as in my invention, will exert a power of lift in proportion to their aggregate capacity. I thus remove the ship from the water by buoyancy, and not the water from the ship, as is usual in graving-docks. The following description will refer to my dock, so arranged that it can readily be put together or taken to pieces while afloat, for repairs or otherwise. Each pontoon can be detached from its columns and the uniting girders, and removed, and again secured in its proper position, at pleasure: in like manner, all its parts can be separated and subdivided, to fit them for exportation, and may be reunited to constitute the dock or lift in any port or harbour where required. [*55

"Plate 1. All the diagrams on this plate refer to the dock or lift as adapted for use in an open sea, harbour, or river, in which the common atmospheric or any other pump is used for the purpose of discharging the water. I will now refer to the various parts as lettered for that purpose,—*a*, pontoons; *b*, hollow columns; *c*, abutments to the columns; *d*, steps for shoring against as they and the ship rise simultaneously out of the water; *e*, girders which stretch from end to end of the dock and unite the pontoons; *f*, blocks on which the keel of the ship rests; *g*, planking; *h*, partitions across each pontoon; *i*, shores; *j*, *upright feed-pipes, one of which descends through each of the columns, to near the bottom of the pontoons, and are united to the main conducting-pipe which passes over the columns and supplies the pumps *k*. Figs. 1 and 3, main conductors; *l*, *m*, engine and pumps; *n*, paths or gangways along each side of the dock *o*. Figs. 2 and 4, light caissons, air and water tight, which I sometimes use between the columns as floats or air-vessels; when thrown open, as in Fig. 4, there is access to the ship between the columns; *p*, valves to admit water to the pontoons when the dock is to be more or less [*56

submerged, which are under the control of the workmen upon the gangways.

"Fig. 1, Plate 2, represents the dock with the pontoons sufficiently submerged to receive a ship over them in a tideless sea; a siphon in this case may be employed to empty the pontoons, as shown, with the same arrangements of upright feeders and horizontal conductor to the main descending outlet communicating with a subterranean receptacle, from which the water may be pumped out at pleasure by a fixed steam-engine or other suitable power. Fig. 2, Plate 2, represents the lift, in an ordinary enclosed basin, in a tidal sea or river, in which a siphon may also be used, as shown, and the water discharged by a drain into the tide-way at low water, or as the tide recedes. By the use of a siphon, as described in the last case, there is a great economy both of time and labour; for, when once the siphon is exhausted of air, it may remain full of water, and an enormous atmospheric pressure is always available, and may be brought into action at pleasure to expel the water from the chambers. By this arrangement ships may be raised in succession for years, without any appreciable expense in labour.

"When many ships are to be brought under repair at the same
*57] time, a cradle on wheels or rollers may be *sunk on the lift, and, when raised to the level of a prepared slip or wharf, each ship may be rolled off the lift on to the slip or wharf.

"When this lift is used to raise sunken ships, it may be constructed as in the last clause of my provisional specification, viz. 'this dock or lift may be constructed without the upright tubes or floats, in which case some of the chambers will remain permanently filled with air, as a counterpoise to the specific gravity of the dock, and the others be emptied of water, and filled with air by flexible tubes.

"Having now set forth the nature of my invention, and in what manner the same is to be performed, I wish it to be distinctly understood that I do not confine myself to the precise forms and arrangements of the parts shown and described, as the same may be varied without departing from the essential principle embodied in my invention as above described, and I do not claim the pontoons or cellular vessels separately; but what I do claim is, the arrangement and combination of all the parts of my floating-dock or buoyant ship-lift, as represented and described, to constitute the same."

It being conceded by the plaintiff that floating-docks constructed of *timber* were well known, and that his invention consisted entirely in the use of *iron* in their construction, according to the mode pointed out in the specification and the drawings accompanying it,—it was objected, on the part of the defendants, that, there being no mention of iron throughout the complete specification, the patent was void for want of a sufficient description of the alleged invention. The Lord Chief Justice being of this opinion, the plaintiff claimed a right to refer to the provisional specification (which did in terms show that the proposed structure was to be entirely of iron), for the purpose of
*58] *explaining his meaning more fully. His lordship, however, ruled that the provisional specification could not be prayed in aid for the purpose of supplying a defect in the subsequent complete specification; and thereupon, under his lordship's direction, a nonsuit was entered

The plaintiff in person, on a former day in this term, moved for a new trial on the ground of misdirection. He submitted, that no engineer reading the two specifications could fail to perceive that iron floating-docks alone were intended; that, even assuming that the complete specification was to be read by itself, and not to derive any aid from the provisional specification, reading it by the light afforded by the diagrams it could only be understood by competent persons to point to a structure of iron; that the statement in the specification that the structure "may be caused to sink by being filled (with water), when, on being again emptied, it will recover its normal condition, the power of flotation being wholly dependent upon the substitution of air for water within it," would not be true if the structure were of timber, inasmuch as the power of flotation would in that case be due in part to the buoyancy of the material, for, though filled with water, it could not sink without the aid of ballast; that the drawings referred to and annexed to the specification speak an universal language, and, to the initiated, even more plainly than words; and that these (and more especially the sections) when looked at by the eye of a competent engineer, would demonstrate to him beyond a doubt that the structure was intended to be of iron, for that the geometrical lines employed could mean nothing else.(*a*) *He referred to Morgan *v.* Seaward, 1 Webster's P. C. 170, 2 M. & W. 544,† where [*59 Alderson, B., said: "The true criterion is this,—has the specification *substantially* complied with that which the public has a right to require? Has the patentee communicated to the public the manner of carrying his invention into effect? If he has, and if he has given to the public all the knowledge he had himself, he has done that which he ought to have done, and which the public has a right to require from him." Again, "The public, on the one hand, has a right to expect that the specification shall be fair, honest, open, and sufficient; and, on the other hand, the patentee should not be tripped up by captious objections which do not go to the merits of the specification." And, finally, he contended, that, read in the manner thus pointed out, this specification has fairly given to the public substantial information as to the manner in which the invention is to be carried into effect.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the Court:—

The plaintiff in this case had obtained a patent for "Improvements in floating-docks." In the course of the trial, it appeared that the construction of floating-docks was not novel. The plaintiff then alleged that his invention did not consist in the construction of floating-docks, but in the application of iron so as to form air-tight and water-tight chambers. The Lord Chief Justice was of opinion, that, as inasmuch as there was no mention of iron in the complete specification, the plaintiff had not complied with the conditions of the letters patent by duly describing the nature of his invention and in what manner it was to be carried into effect; and accordingly he directed a nonsuit to *be entered. We are all of opinion that [*60 he was quite right in so doing. The complete specification, taken by itself, confessedly did not make any such claim as suggested. It has, however, been urged by the plaintiff, that, if it be read with

(*a*) If this had been *proved*, as it unquestionably might have been, the result would probably have been different.

the provisional specification, it will be found substantially to contain that claim. But, even if the specification can be so read (which we do not admit), we are of opinion that it discloses no such claim, and therefore that the nonsuit was right. In his provisional specification, the inventor says, "I so construct a floating-dock or ship-lift that it may be sunk to the bottom of the water, or to any depth necessary to receive a ship, and may then be caused to float or rise until the ship is lifted out of the water." He then goes on to describe the mode of constructing the parts. And, when he comes to his complete specification, the inventor thus professes particularly to describe the nature of his invention:—"The principle embodied in my invention is that of buoyancy; not the buoyancy of a basin or open vessel, which exists only so long as it remains partially above water, and arises, under such circumstances, from its capacity being greater than its displacement; but that of an air-tight and water-tight chamber, which may be entirely submerged by pressure, and yet perfectly retain its buoyancy, or may be caused to sink by being filled, when, on being again emptied, it will recover its normal condition, as stated in my provisional specification,—'being filled or partially filled with air or water, at pleasure, will sink or float with any required degree of buoyancy,'—the power of flotation being wholly dependent upon the substitution of air for water within it; as, for instance, if a given quantity of water be removed from a submerged chamber or pontoon, it will lift and sustain an equivalent superincumbent weight; therefore, many chambers
*61] or pontoons arranged together, as *in my invention, will exert a power of lift in proportion to their aggregate capacity. I thus remove the ship from the water by buoyancy, and not the water from the ship, as is usual in graving-docks." All this is utterly inconsistent with the suggestion that the claim consists in the use of *iron* in the construction of floating-docks.

We think it right to add, that it must not be inferred that the Court entertains an opinion that the alleged invention, even if it were appropriately claimed, could properly be the subject of letters patent. It is unnecessary on this occasion to give any opinion upon that point; but we wish not to be supposed to sanction such a notion.

Rule refused.(a)

On a subsequent day, the plaintiff prayed leave to appeal against this decision.

ERLE, C. J.—I believe none of us entertain any doubt; but, as an important interest is at stake, we do not object to the opinion of a Court of error being taken on the matter. The nonsuit proceeded upon the plaintiff's own explanation of his invention.

Leave to appeal granted.

(a) See Horton v. Mabon, 12 C. B. N. S. 437 (E. C. L. R. vol. 104), where it was held that the application of a known article to a purpose analogous to those to which it had before been applied, is not the subject of a patent,—although the result of its application to the new purpose may be the production of a known machine in a cheaper or better manner.

The discovery of ether in surgical operations was merely the discovery of a more perfect *effect* of the action of well-known agents, and could not be patented: Morton v. The N. Y. Eye Infirmary (U. S. C. C. South. Dist. N. Y.), 11 Am. Law Reg. (1863) 672. And the substitution of a better mate-

rial for the manufacture of a particular article—as the substitution of clay for metal or wood in the manufacture of knobs—is not the subject of a patent: Hotchkiss *v.* Greenwood, 4 McLean 457; s. c., 11 Howard 248.

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*JOHN CHARLES BUCKMASTER, Appellant; THOMAS ANDREW FITZGERALD REYNOLDS, Respondent. [*62

Nov. 14.

The 21st section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, enacts, that, "if any person knowingly personate and falsely assume to vote in the name of any parishioner entitled to vote in any election under this Act, or forge or in any way falsify any name or writing in any paper purporting to contain the vote or votes of any parishioner voting in any such election, or *by any contrivance attempt to obstruct or prevent the purposes of any such election*, the person so offending shall, upon conviction, be liable," &c.:—Held, that an intentional obstruction of the voting by actual violence, is an offence within the Act.

The duty of the Court, upon a case stated under the 20 & 21 Vict. c. 43, is simply to answer the question of law put to them by the magistrates.

THE following case was stated for the opinion of the Court pursuant to the statute 20 & 21 Vict. c. 43.

This was an information preferred by John Charles Buckmaster, of St. John's Hill, Battersea, one of the inspectors of votes of the parish of St. Mary, Battersea, on the occasion of the election of eight vestrymen, held on the 27th of May, 1862, under the 16th, 17th, and 18th sections of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, against Thomas Andrew Fitzgerald Reynolds, of Battersea aforesaid,—for that he the said Thomas Andrew Fitzgerald Reynolds, on the said 27th day of May, 1862, did unlawfully, *by a certain contrivance*, to wit, by riotously forcing himself into the place holden there for the purpose of electing eight vestrymen for the said parish in accordance with the provisions of the said Act, preventing the free access of the rate-payers to such place, and endeavouring forcibly to take possession of the balloting-box used for the purpose of the said election, *attempt to obstruct such election.*

The information was laid under the 18 & 19 Vict. c. 120, s. 21, which enacts, that, "if any person knowingly personate and falsely assume to vote in the name of any parishioner entitled to vote in any election under this Act, or forge or in any way falsify any name or writing in any paper purporting to contain the vote or votes of any parishioner voting in any such election, or *by any contrivance attempt to obstruct or prevent the purposes of any such election*, the person so offending *shall, upon conviction before any two or more jus- [*63 tices of the peace having jurisdiction in the parish, be liable to a penalty of not less than 10*l.* and not more than 50*l.*; and, in default of payment thereof, shall be imprisoned for a term not exceeding six nor less than three months."

Upon the hearing of the information, it was proved before the magistrate at the Wandsworth Police Court, that, on the 27th of May, 1862, a poll was taken for the election of eight vestrymen for the parish of St. Mary, Battersea, under the Metropolis Local Management Act. The poll was taken by ballot in a private room, in the presence of the churchwardens and four inspectors, two of whom were appointed by the churchwardens and two by the rate-payers, for the purpose of examining the votes. At the entrance of this room constables were

placed for the purpose of preventing more persons from entering than could conveniently advance and retire to and from the table on which the balloting-box was placed. Each person voting deposited a folded paper in the balloting-box, with the names of the candidates he voted for printed upon it. There were two lists of candidates, one printed on red paper, the other on yellow. Towards the close of the poll, it was well known that the red party was in a hopeless minority. About a quarter before 8 o'clock,—the time for closing the poll being 8 o'clock,—the defendant, who was a man of influence with the red party, was heard threatening outside the place where the poll was being taken,—"Come on; I know the law. It is past 8 o'clock. It is now an open vestry. I want them to give me in charge." Thereupon the defendant, at the head of a large number of people, forced his way into the room where the poll was being taken, pushing aside the constables, and throwing his legs over the table on which the bal-
*64] loting-box was placed. About *thirty other persons of his party followed him into the room. It became necessary to remove the balloting-box to a distant part of the room. *By reason of the defendant's violence, the polling was suspended for about* 10 *minutes, during which it was impossible for any rate-payers to tender their votes.*

It was contended that the defendant's intention was, to get possession of the balloting-box, and so to prevent the purposes of the election.

The magistrate thought the evidence did not warrant him in concluding that the defendant's intention was such.

It was then contended by the complainant that any intentional obstruction of the voting by actual violence, was an offence within the 21st section of the Metropolis Local Management Act.

The magistrate thought that it was not an offence within the meaning of the statute, and thereupon dismissed the complaint.

The question for the opinion of the Court was, whether an intentional obstruction of the voting at such an election, by actual violence, is an offence within the meaning of the 21st section of the Metropolis Local Management Act.

Watkin Williams, for the appellant.—The respondent clearly was guilty of the offence with which he was charged. The evidence shows that he deliberately and designedly obstructed the business of the election. The magistrate evidently was misled by the word "contrivance," which is used in the 21st section of the 18 & 19 Vict. c. 120, and seems to have thought, that, to bring a party within that section, there must be some devising or planning of an obstruction. In this he was clearly wrong. It is quite manifest that any intentional obstruction of the voting, by violence, is an offence within the Act.

*65] **Day*, for the respondent.(*a*)—The decision of the magistrate was right. The three acts charged against the respondent in the information constitute the contrivance, viz., the riotously forcing himself into the room where the polling was going on, the preventing the free access of the rate-payers thereto, and the endeavouring forcibly to take possession of the balloting-box. The magistrate expressly

(*a*) The material points marked for argument on the part of the respondent were as follows:—"That the polling was irregularly held, both in respect of time and place, and was not a polling within the meaning of the enactment set out in the case: and that the things found by the magistrate to have been done by the respondent were not within the enactment in the Metropolis Local Management Act."

negatives this latter; and it would appear from the evidence set out that the respondent bonâ fide believed that it was past 8 o'clock, and consequently that the voting was at an end, before he entered the room. The offences enumerated in the 21st section are, knowingly personating and falsely assuming to vote in the name of another, forging or in any way falsifying any voting-paper, or by any contrivance attempting to obstruct or prevent the purposes of any election. The magistrate was clearly warranted in finding that there was no evidence that the respondent had been guilty of either of these acts. [BYLES, J.—The charge before the magistrate was, that the respondent riotously forced himself into the place of polling, prevented the free access of the rate-payers, and endeavoured forcibly to take possession of the balloting-box. ERLE, C. J.—The question which the magistrate has submitted to us, and which alone we are to answer, is, whether an intentional obstruction of the voting by actual violence is an offence within the meaning of the 21st section. Do the facts set out show that the respondent was *guilty of actual violence for the purpose of obstructing the business of the election?] In [*66 dealing with the question, the Court will look at the whole of the facts set out in the case, and at the words of the statute. [ERLE, C. J. —What is the duty that is cast upon us by the statute under which these cases are brought before us? The statute recites that "it is expedient that provision should be made for obtaining the opinion of a superior Court on *questions of law* which arise in the exercise of summary jurisdiction by justices of the peace." The 2d section enacts, that, "after the hearing and determination by a justice or justices of the peace of an information or complaint which he or they have power to determine in a summary way, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior Courts, to be named by the party applying." The 6th section enacts that "the Court to which a case is transmitted under this Act shall hear and determine *the question or questions of law arising thereon*, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices, with the opinion of the Court thereon, or may make such other order in relation to the matter, and may make such order as to costs, as to the Court may seem fit." The whole purport of the statute was, to enable the Courts at Westminster to answer questions of law.] The Court is to say whether upon the whole matter presented to them the decision arrived at by the magistrate was right or wrong. To constitute an offence, the "contrivance" must *be by some act or acts [*67 ejusdem generis with the particular offences enumerated. [BYLES, J.—Your strong point is that there must be a contrivance, an *intention* to obstruct the voting.] Precisely so. [ERLE, C. J.— We are all agreed that we cannot interfere with the decision the magistrate has come to. All we can do is to answer the question of law which he puts to us.] The magistrate having dismissed the complaint, it is not competent to him to rehear it.

Wi liams, in reply.—The respondent clearly intended to obstruct the voting, which was de facto going on at the time. The magistrate evidently came to the conclusion that he ought to convict, if the acts charged against the respondent constituted an offence within the Act. [BYLES, J.—What judgment do you ask us to give?] That an intentional obstruction of the voting by actual violence is an offence within the 21st section of the Metropolis Local Management Act.

ERLE, C. J.—In this case the question put to us by the magistrate is, whether an intentional obstruction of the voting at an election of vestrymen, by actual violence, is an offence within the meaning of the 21st section of the Metropolis Local Management Act. The enactment upon which we are thus called upon to put a construction, is, that, "if any person knowingly personate and falsely assume to vote in the name of any parishioner entitled to vote in any election under this Act, or forge or in any way falsify any name or writing in any paper purporting to contain the vote or votes of any parishioner voting in any such election, or by any contrivance attempt to obstruct or prevent the purposes of any such election, the person so offending shall, upon conviction," &c., be liable to a certain penalty. The
*68] respondent is charged with a *violation of that enactment, and it appears from the evidence which is set out in the case before us, that he forced himself into a room in which an election of vestrymen was going on, and by his violence caused the polling to be suspended for about ten minutes, during which time it was impossible for any rate-payers to tender their votes. Upon these facts, the magistrate puts to us the general question I have before mentioned. My answer to it is in the affirmative, in the wide and general words which are put before me. It seems to me, that, if a man, with intention to obstruct the voting, uses violence, he is as much guilty of an offence within the Act as if he personated a voter or forged a voting-paper. That is the best opinion I can form upon the materials before me. I therefore send back the case to the magistrate with that answer; but accompanying it by a statement that upon the facts set forth I am unable to see that he has come to a wrong conclusion. A man cannot be said to be guilty of a delict unless to some extent his mind goes with the act. Here, it seems that the respondent acted in the belief that he had a right to enter the room, and that he had no intention to do a wrongful act. That being so,—though the facts are very scantily stated,—I see no reason for altering the conclusion the magistrate has arrived at.

WILLIAMS, J.—I am of the same opinion.

BYLES, J.—I entirely agree with my Lord that there is no ground for saying that the magistrate came to a wrong conclusion. Believing it to be past 8 o'clock, and therefore that the vestry was an open one, the respondent forced himself into the room where the voting was going on, and thereby prevented and obstructed the polling. I quite
*69] agree that there may be a *contrivance to do such an act by violence. But, if he did it under a misapprehension of his right, the respondent would not be intending by violence to obstruct or prevent the purposes of the election.

KEATING, J.—I am of the same opinion. I see no reason for saying that the magistrate came to a wrong conclusion upon the facts. If

the question he intended to put to us was whether "contrivance," in the statute, is to be confined to cases in which there is an absence of violence, I must say I see nothing in the enactment so to confine it. There may be a contrivance part of which consists in a resort to violence. But a mere act of obstruction, in the belief that the polling was over, would not amount to the offence charged.

Decision affirmed.

RICHARDS and Another *v.* DAVIES, Clerk. *Nov.* 14.

Testator devised property to trustees and their heirs, to the use of his daughter A. J. for life, and, after her decease, in trust for such one or more of her *children*, or his, her, or their issue, in such manner and form, &c., as A. J. should by will appoint; and, in default of apointment, "in trust for all and every of her *children*, and the heirs of their body or bodies lawfully begotten, in equal shares and proportions." The testator then proceeded,—"And in case of the death of my said daughter A. J. without leaving any *child* her surviving, and in the event of such *child* or *children* her surviving and dying without leaving any issue of his or her body, then in trust for my own right heirs for ever."

A. J. had a son who died in her lifetime, having previously joined with her in the execution of a disentailing deed:—

Held, that the son of A. J. took a vested estate tail under the will, and consequently that the ultimate limitation to the right heirs of the testator was barred.

1. THIS is an action of ejectment brought by the plaintiffs, Llewellyn Davies Richards and Elizabeth Mary Owen, against Walter Davies, Joseph Gronow, and David Seaborne, as tenants in possession of the following hereditaments, situate in the parish of Newport, in the county of Pembroke, that is to say, the *said Walter Davies is [*70
in the possession of a dwelling-house and garden situate in High Street (being a part of the said hereditaments), the said Joseph Gronow is in the possession of a dwelling-house and garden situate in Goat Street (being other part of the said hereditaments), and the said David Seaborne is in the possession of a stable in High Street aforesaid, and of a meadow called Dol Jacob, a field called Park-dan-y-dre, and a field called Ship Field (being the remaining part of the said hereditaments); and the defendant Thomas Davies has by leave of the Court been allowed to appear and defend, and has appeared accordingly to defend as the landlord of the said hereditaments: and by a Judge's order, dated the 15th of April, 1862, it was ordered that the facts be turned into a special case for the opinion of the Court, without any pleadings.

2. John Davies, late of Newport, in the county of Pembroke, merchant, deceased, was at the time of making his will hereinafter mentioned, and so continued to be until the time of his death, seised of or for an absolute estate of inheritance in fee simple of the hereditaments hereinbefore particularly described, and duly made and published his last will and testament in writing, dated the 7th of September, 1834 (which was duly executed and attested as by law then required for the purpose of disposing of real estates by devise), and thereby devised the before-mentioned hereditaments in the following terms:—

"I give and devise all that messuage or dwelling-house now in the tenure or occupation of John Morgan, shoemaker, and the stable opposite the said house, and all that garden behind or between my

different houses, and not hereinbefore devised, also all that meadow called Dol Jacob, also Park-dan-y-dre or part of Major's land, and the
*71] field in Goat Street *otherwise called Ship Field, all which said hereditaments and premises are situate in Newport aforesaid, unto Llewellyn Thomas and David Davies and their heirs, To the use and behoof of my daughter Ann James for and during the term of her natural life; and, from and immediately after her decease, it is my will, and I do hereby direct and declare, that my trustee or trustees shall stand and be possessed of and interested in the said hereditaments and premises in trust for such one or more of her children, or his, her, or their issue, in such manner and form, and in such parts, shares, and proportions, and for such estate or estates as my said daughter Ann James, by her last will and testament in writing, or any codicil thereto, to be by her duly executed in the presence of and attested by three or more credible witnesses, shall direct or appoint; and, in default of such direction or appointment, and as to so much and such parts of the said hereditaments and premises to which no such direction or appointment shall extend, In trust for all and every of her children and the heirs of their body or bodies lawfully begotten in equal shares and proportions; and in case of the death of my said daughter Ann James without leaving any child her surviving, and in the event of such child or children her surviving and dying without leaving any issue of his or her body, then in trust for my own right heirs for ever."

3. The testator John Davies died on the 12th of February, 1835, without having revoked or altered the devise made by him of the before-mentioned hereditaments.

4. The said Ann James survived the testator, and had issue two children and no more, that is to say, a daughter who died on the 15th of March, 1828, an infant, under the age of one year, and a son,
*72] Thomas *Davies James, who attained the age of twenty-one years on the 29th of December, 1850.

5. The said Ann James did not exercise the power of appointment given to her by the said will.

6. By an indenture made the 2d of August, 1852, between the said Ann James, then a widow, of the first part, the said Thomas Davies James of the second part, and Richard David Jenkins of the third part, and which indenture was signed, sealed, and delivered by the said Ann James and Thomas Davies James, and was enrolled in Her Majesty's High Court of Chancery within the time prescribed by and in accordance with the provisions of the statute for abolishing fines and recoveries,—after reciting that the said Ann James was then tenant for life in possession of the before-mentioned hereditaments, with remainder to her said son Thomas Davies James in tail, and that the said Ann James and Thomas Davies James were desirous of barring the estate tail vested in the said Thomas Davies James, subject to the possibility of the same being destroyed by the birth of further issue to the said Ann James, and that the inheritance in fee simple in possession of the before-mentioned messuages, tenements, hereditaments, and premises should be limited to the uses and in the manner thereinafter expressed,—It is witnessed, that, in order to defeat and destroy all estates tail of the said Thomas Davies James of, in, and to

the said hereditaments and premises, and all estates, rights, titles, interests, and powers to take effect after the determination or in defeasance of such estates tail, and in order to assure and limit the inheritance in fee simple in possession of and in the said hereditaments and premises to the uses and in manner thereinafter expressed, and for a nominal consideration, she the said Ann James, and the said Thomas Davies James (with the consent of *the said Ann James), did and each of them did grant, release, and confirm [*73 unto the said Richard David Jenkins, his heirs and assigns, all that and those messuages or dwelling-houses, lands, and hereditaments therein particularly described (being the hereditaments so devised by the will of the said testator John Davies as aforesaid), to hold the same unto the said Richard David Jenkins and his heirs for ever, freed and discharged from the estates tail, and all estates, rights, titles, interests, and powers to take effect after the determination or in defeasance of the said estates tail; nevertheless, to the use of the said Ann James and her assigns for the term of her natural life; and, from and immediately after the determination of that estate by forfeiture or otherwise, to the use of the said Richard David Jenkins and his heirs during the life of the said Ann James, in trust to preserve the contingent use and estate thereinafter limited from being defeated or destroyed, but nevertheless to permit the said Ann James and her assigns during her life to receive and take the rents, issues, and profits thereof to and for her and their own use and benefit during her life; and, from and immediately after the decease of the said Ann James, then in trust to and for the only proper use of the said Thomas Davies James, his heirs and assigns, for ever.

7. The said Thomas Davies James died a bachelor on the 30th of May, 1856, and in the lifetime of his mother the said Ann James, having previously made his will in writing, dated the 1st of April, 1856 (which was duly executed and attested as by law required for the purpose of disposing of real estates by devise): and he thereby gave and devised all and singular his real and personal estate of what nature or kind soever and wheresoever situate, and of which he might have power to dispose by will, unto his said mother Ann James, to *and for her own sole and separate use and benefit during her [*74 life; and, after her decease, he devised and bequeathed the same unto his uncle, the defendant Thomas Davies, his heirs, executors, administrators, and assigns.

8. The defendant Thomas Davies, claiming to be entitled to the said devised hereditaments for an estate in fee simple upon the death of the said Ann James, entered into and has since continued in the possession or receipt of the rents and profits of the said devised hereditaments.

9. The plaintiffs are the right heirs or co-heirs at law of the testator; and they represent the person who was the right heir or heir at law of the testator at his death; and they are the persons who are under the before-mentioned devise to the right heirs of the testator, in case the previous limitations in the will have failed to take effect, or have been determined, as to the entirety, or some share thereof,(a) entitled

(a) It was at first supposed that the daughter of Ann James had died after the date of the will.

to the entirety of the said hereditaments, or such share, as co-parceners, in equal moieties.

10. The plaintiffs have accordingly brought this action of ejectment.

11. The plaintiffs contend,—first, that they are, under the ultimate trusts in the said will, absolutely entitled to the entirety of the same hereditaments; but, if not entitled to the entirety,—secondly, that they are at least entitled to an equal moiety(*a*) or half part of the same hereditaments.

12. It is admitted by the defendant that there has been an actual ouster of the plaintiffs in respect to their estate, interest, or share in the said hereditaments.

*75] 13. In case the Court should be of opinion that the *plaintiffs are entitled to recover the possession of the said hereditaments, or any part thereof, then judgment is accordingly to be entered for the plaintiffs for so much of the said hereditaments as the plaintiffs shall be entitled to recover, with costs of suit, including the costs of and incidental to the special case; otherwise judgment is to be entered for the defendant, with costs of defence, including the costs of and incidental to the special case.

Tripp (with whom was *J. W. Smith*), for the plaintiffs.—The will in question must be read with due allowance for the evident want of skill and appreciation of the force of technical expressions in the person by whom it was drawn. It contains a gift in tail to the son, subject to the contingency of his surviving his mother; and, he having died in the lifetime of his mother, the disentailing deed could have no operation, and consequently the ultimate limitation to the right heirs of the testator took effect. No doubt, in construing a will, effect must be given to "heirs of the body" and "issue" as words of limitation, unless there are countervailing words in other parts of the instrument to show that the meaning of the testator was otherwise. Here, the intention of the testator is abundantly expressed by the last clause of the will,—"and, in case of the death of my said daughter Ann James *without leaving any child her surviving*, and in the event of such child or children her surviving and dying without leaving any issue of his or her body, then in trust for my own right heirs for ever." [BYLES, J.—You read the second limitation, to "all and every of her children *her surviving?*"] Yes. [KEATING, J.—So that, if the son Thomas, dying in the lifetime of his mother, had left a son, your construction

*76] would deprive *him* of the estate?] That is cured by the *power of appointment given to the daughter: and so effect is given to the whole instrument. [WILLIAMS, J.—Is not the true construction of the will this, that, if the daughter happened to pre-decease the children, she was to have a power of appointment?] That assumes that the son took a vested estate tail. There is no case precisely in point. But, in all the cases, from Taltaram's Case, 12 E. 4, fo. 14 b, pl. 16, downwards, the Courts have struggled against the power to defeat remainders over. In Driver d. Edgar *v.* Edgar, 1 Cowp. 379, the testator devised to his daughter an express estate tail, but afterwards said that such devise should be void as to inheritance of heirs if she died without issue, and then that the estate should descend to his heir male: and it was held that a common recovery suffered by the tenant in tail in her

(*a*) It was at first supposed that the daughter of Ann James had died after the date of the will.

lifetime was good, though she afterwards died without issue. Lord Mansfield said: "The validity of the recovery suffered by Mary depends upon whether she was tenant in tail of that estate, or tenant for life only: and it is necessary for the plaintiff to support, that, at the death of the testator, she was (during her own life) tenant for life only. Now, the estate is given to her and the *heirs of her body*, which is an estate tail. Nevertheless, the intention of the testator may restrain that estate of inheritance, and confine it to an estate for life only. It is insisted that it was the intention of the testator that the estate of inheritance should be restrained. But, has the testator said it should be so during her life? No: he has only restrained it upon future contingencies. The first is, the event of her own death; but, till that contingency happens, the inheritance is in her. The second is, upon her leaving no children. If she was only tenant for life under this devise, there is an end of the title upon the second limitation; because, in that case, it is a limitation *upon a contingent remainder, [*77 which is void. Further, supposing her tenant for life only, by suffering this common recovery she has committed a forfeiture. Who is to enter? The next heir male. Suppose she had lived and had a son afterwards, the next heir male must take place, contrary to the clear intention of the testator in that case. It is manifest that the intention of the testator was to prevent a common recovery being suffered. But, where a testator intends that which by law he cannot do, the law will not allow his intention to take effect. If, therefore, she was tenant in tail to the hour of her death, nothing is so clear as that all conditions limited upon such estate tail are avoided by the common recovery which has been suffered. And we are of opinion that Mary had an estate tail." In Denne d. Radclyffe *v.* Bagshaw, 6 T. R. 512, the testator devised to Margaret (an only child) for life, remainder to the first son of her body "if living at the time of her death," and the heirs male of such son, and, for default of such issue, to the second son of her body "if living at the time of her death," and the heirs male of such second son, &c.; and, for default of such issue male, remainder to A. Margaret had one son, who died in her lifetime leaving a son: and it was held that Margaret only took an estate for life, and that neither her son or grandson took any estate, but that the remainder to A. took effect. [WILLIAMS, J.—It seems never to have occurred to the testator that a child of the tenant for life might die in the lifetime of the tenant for life, leaving issue. In Young *v.* Turner, 1 Best & Smith 550 (E. C. L. R. vol. 101), the testator devised dwelling-houses to trustees for the life of his niece Mary Shelton, upon trust to permit her to take the rents and profits of the same during her life; and, from and immediately after the decease of his niece, unto her issue, to be equally divided amongst them at their respective *ages of twenty-one [*78 years or days of marriage, and to the heirs and assigns of such issue respectively; and, if any of such issue should be under the age of twenty-one years at the decease of his niece, he directed an equal share of the rents and profits to be appropriated towards the education and maintenance of such issue as should not have attained the age of twenty-one at the decease of his niece; and, if his niece should die leaving only one child, then unto such only child, and his or her heirs, as soon as he or she should attain the age of twenty-one: but, in case

his niece should die without leaving any issue of her body at the time of her decease, or in case all such issue should die under the age of twenty-one years and unmarried, then to his brother's children. Mary Shelton married and had one daughter, who attained the age of twenty-one years, but died (unmarried) in the lifetime of her mother. The Court held, that, if an estate in fee in remainder vested in the daughter of Mary Shelton upon her attaining the age of twenty-one years, such estate was divested upon her death in the lifetime of Mary Shelton.] The words there were not so strong as those here; and the decision proceeded mainly upon the authority of Bythesea *v.* Bythesea, 23 Law J., Ch. 1004. There, the testatrix bequeathed the residue of her personal estate upon trust for her grandson for life, and, after his decease, "in case he should leave any child or children," then in trust for all and every such child and children equally, to be paid at the age of twenty-one years, and the share of each such child to be a vested interest in him or her; and, from and after the decease of her grandson, "in case he should not leave any such child or children," then over. The grandson had one child only, who attained twenty-one, and died in his father's lifetime, leaving a widow him surviving.

*79] In a suit by the widow, *claiming to be entitled as the child's representative, it was held by the Lord Chancellor (Lord Cranworth) and Lord Justice Turner, affirming the decision of Wood, V. C. (17 Jurist 645), that the gifts over took effect. "Primâ facie," said Lord Cranworth, "leaving children, means leaving children at the period of death; and, if this construction is adopted, the second contingency has happened upon which the property was given over. For the plaintiff, however, it was contended that the first contingency has in fact happened; for that, in this case, 'leaving' must be construed as 'having children;' for that the testatrix could not be held to intend that the gift to the children should depend on the accident of some or one of them surviving their father. The answer to this is, that the words of the will are clear and unambiguous. It may be impossible to explain why the testatrix should have made such a disposition; but, nevertheless, she was at liberty to do so. But then reliance was placed upon the direction that the share of each child should be considered a vested interest. The answer to that is, that that direction may apply only to the contingency happening of H. F. Bythesea (the grandson) leading a child surviving." [ERLE, C. J.—The Court there give no effect to the word vested.] None whatever.

Mellish, Q. C. (with whom were *Sir T. Phillips* and *Lovell*), contrà.—Upon the whole scheme of the will, it is plain, that, as long as any issue of his daughter Ann James remains, the testator did not intend the estate to go over to his heir at law. The power of appointment shows this. It is plain that "child" is to be construed as nomen collectivum, embracing grandchildren and issue: otherwise, if the daughter died leaving grandchildren, but no child, the estate would

*80] *go over to the heir at law. The devise over evidently contemplates an indefinite failure of issue. It is immaterial to consider whether this is an executory devise or a remainder. [WILLIAMS, J.—Whether the words "in case of the death of my said daughter Ann James without leaving any child her surviving," mean if she die without leaving *children*, or without leaving *any issue* her surviving,

the event has happened. My difficulty is this,—looking at that provision of the will, and at the former devise, which is, in default of appointment, "in trust for all and every of her children and the heirs of their body or bodies lawfully begotten," to reconcile the two, must we not construe that as "her surviving?"] The words of the devise are the natural words to give to a vested interest. If a vested remainder, Ann James leaving only a grandchild, such grandchild clearly would take the vested interest of its parent. [BYLES, J.—It is very difficult to say that throughout this will the words child or children are to be construed as issue.] In 2 Jarman on Wills, 3d edit. 422, it is said: "It remains to be observed, that, where a devise to a person and his issue (or, to him and the heirs of his body) is followed by a limitation over in case of his dying without leaving issue *living at his death*, the only effect of these special words is, to make the remainder contingent on the prescribed event." It is obvious that the testator never could have intended that the estate should go over to his heir at law, to the exclusion of the issue of a child of his daughter dying in her lifetime. [BYLES, J.—Your argument would be good if "children" is to be construed as "descendants."] In Doe d. Cannon *v.* Rucastle, 8 C. B. 876 (E. C. L. R. vol. 65), the testator devised as follows,—"I give and devise to my son Stephen a small field at, &c., to hold to my said son Stephen for and during the term of his natural life; and, from and after his death, *then I give and devise the same to the issue of his body lawfully begotten, [*81 if more than one, equally amongst them; and, in case he shall not leave any issue of his body lawfully begotten at the time of his death, then I give and devise the same to my heir or heirs at law:" and it was held that Stephen, the son, took an estate tail. So, in Marshall *v.* Grime, 29 Law J., Ch. 592, where a testator devised real and personal estate to his son J. R. M., his heirs, executors, and administrators, his will being that his son should not have power to sell the estates and lands, but that they should go to his son's lawful issue absolutely; and, if he should not have any issue him surviving, then over: it was held that the son took an estate tail. There is no absurdity in holding this to be a vested interest.

Tripp was heard in reply.

ERLE, C. J.—I am of opinion that our judgment in this case ought to be for the defendant. The case turns upon the construction of the will of John Davies, by which the lands in question were devised to trustees in fee, in trust for the testator's daughter Ann James for life, remainder for such one or more of her children, or his, her, or their issue, in such manner and form, and in such parts, shares, and proportions, and for such estate or estates as Ann James by will or codicil should direct or appoint; and, in default of any such direction or appointment, "in trust for all and every of her children and the heirs of their body or bodies lawfully begotten, in equal shares and proportions." If the will had stopped there, there could have been no doubt that the son of Ann James would have taken a vested estate tail in the property. But the difficulty has arisen from the provision which follows, *viz. "and, in case of the death of my said [*82 daughter Ann James without leaving any child her surviving, and in the event of any such child or children her surviving and

dying without leaving any issue of his or her body, then in trust for my own right heirs for ever." The question is, whether the child of Ann James took a vested estate tail as soon as he came in esse, liable to be defeated by the exercise of the power of appointment, or whether the provision at the end made the limitation a conditional limitation contingent on Ann James leaving issue her surviving. I am of opinion that he took a vested estate tail. It seems to me that we give effect to the plain words of the will by holding that an estate tail vested as soon as there was a child in esse capable of taking; and that the construction contended for by Mr. *Tripp* is based upon an alteration of the testator's language. It is the duty of the Court, in construing a will, to hold an estate to be vested rather than contingent, if the language used is capable of that construction: and, as I read this will, it seems to me that its words are capable of being so construed. Looking at the power of appointment, and at the persons in whose favour it is to be exercised, I think it is impossible to suppose that the testator could have intended that if Ann James had children who died in her lifetime leaving issue, the grandchildren should be disinherited. It is plain to my mind that the testator intended to provide for the line of his daughter Ann James and her issue, and that, in the event of the line of her descendants failing, the estate should go over to his own right heirs. This perhaps is not giving a sensible construction to the clause at the end of the will. But it must be borne in mind that the instrument is evidently drawn by an unskilled person, having no very precise idea of the effect of technical
*83] expressions. The general *scheme of the will, as it seems to me, is, that the daughter was to take an estate for life, with remainder to her issue in tail; and, in the event of her leaving no issue, then the estate was to go to the right heirs of the testator. Although this construction enables a child of the first taker to defeat the limitation over, it is an invariable rule in the construction of wills that the testator is not to be supposed to have in his contemplation the possibility of his intentions being frustrated by the exercise by a tenant in tail of his disentailing power. If that power had not been exercised in this case, the whole intention of the testator would have been carried into effect by the construction which I put upon the whole will,—the line of the daughter having failed, the limitation over to the testator's right heirs would have taken effect.

WILLIAMS, J.—I concur with my Lord, but I am bound to say not without considerable doubt and hesitation. The will is unquestionably the work of one who, with a certain degree of knowledge of the technical language of wills, has so employed that language as to fail accurately to convey his meaning. But what induces me to concur in the judgment of my Lord, is, that, if we were to give the will the interpretation which Mr. *Tripp* seeks to put upon it, the consequence would be, that, if Thomas Davies James, the son of the testator's daughter Ann James, had died in her lifetime leaving issue, that issue would have been altogether excluded. This seems to me to be so harsh a construction of the will that it is extremely improbable that the testator could have so intended. His intention so to exclude the issue of his daughter's child is also to some extent negatived by the

circumstance that the terms of the power which is given to *the daughter enables her to appoint to the issue of her children as well as to the child himself. It remains to consider what is the legitimate consequence of rejecting as improbable a construction which would lead to so harsh a result. The consequence, I take it, is, not that we are to assume to ourselves to reform the will, but that we should if possible give it such a construction as will more reasonably carry into effect the testator's intention. It is not because it is obvious that the consequences which would ensue from the child of his daughter dying in her lifetime, leaving issue, that we can give to the will a construction which its language does not fairly admit of. The difficulty I feel, is, to see how, applying this ordinary and well-established rule of construction, we can avoid coming to a conclusion adverse to the plaintiff and in favour of the defendant. Now, I do not think there is any difficulty in the case, upon the assumption that Thomas Davies James, the son of the first taker, was included in the gift to "all and every of her (the daughter's) *children* and the heirs of their body or bodies lawfully begotten." If that were so, it seems to me to be plain that there are words which would give him an estate tail immediately expectant on his mother's life estate,—which, together with all remainders depending upon it, might of course be barred by a disentailing deed. It is clear, according to the rule to which I alluded in the course of the argument, that, where a limitation, whether in a deed or a will, is capable of taking effect as a remainder, it shall not be construed to be an executory devise. If, then, Thomas Davies James took at all, he took an estate tail. Then comes the question, did he take under the description before mentioned? In all these cases where an estate is given to one as tenant for life and afterwards to his children as a class, the question always may arise, *whether the class referred to includes children alive at the death of the testator, or is it confined to the children living at the death of the first taker. If it means children living at the death of the testator, then under this will it is clear that Thomas Davies James would take an estate tail, and might bar it as he has done. If, on the other hand, children living at the death of the first taker only were intended, Thomas Davies James being then dead, he would not be included in the class referred to, and would not take at all. That, therefore, is the question and the only question upon the construction of this will, —was Thomas Davies James, the son of Ann James, included in the class to whom the estate is given? Now, the first mention of "children" in the will is this,—after giving a life estate to his daughter, the testator goes on "and, from and immediately after her decease, it is my will, and I do hereby direct and declare, that my trustee or trustees shall stand and be possessed of and interested in the said hereditaments and premises, in trust for such one or more of her *children*, or his, her, or their issue, in such manner, &c., as my said daughter by her last will and testament in writing, or any codicil thereto, shall direct or appoint." It is clear that "children" there means children who shall be living at the time of the death of Ann James; the power being to appoint by will or codicil only. Then comes the clause upon which the question turns,—"And, in case of the death of my said daughter Ann James without leaving any *child* her surviving, and in

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the event of such child or children her surviving and dying without leaving any issue of his or her body, then in trust for my own right heirs for ever." If "child or children" there means the same as "children" in the former clause, it is manifestly confined to children
*86] living at the death of the first taker; and *upon that hypothesis Thomas Davies James is excluded. That is the argument urged on the part of the plaintiff: and it is that which raises some doubt in my mind. Upon the whole, however, considering the harsh and improbable consequences which would result from the plaintiff's construction, I feel justified in yielding to the opinion of the rest of the Court, which gives the word "children" the larger and more general meaning, and therefore I concur with them in thinking that the defendant is entitled to our judgment.

BYLES, J.—I am of opinion that the person claiming under the disentailing deed in this case, viz., the defendant, is entitled to our judgment. I agree in the observation made by Mr. *Tripp* at the outset, that this will is manifestly drawn by a person not very competent for the work, and therefore that the language of it is to be understood with reference to the degree of skill which he possessed in the art of drawing wills to convey lands. I do not say that, in construing a will extrinsic evidence is to be admitted as to the more or less degree of skill and knowledge possessed by the person who framed or settled the instrument: but I apprehend it is perfectly legitimate to look at the will and to gather from the intrinsic evidence upon the face of it what degree of skill the framer of that will had in expressing in legal and technical language that which he intended to convey. I well remember that that consideration was strongly insisted upon in the House of Lords in the great case of Tellusson *v.* Rendlesham, 7 House of Lords Cases 429. Again, in Jeffries *v.* Alexander, 8 House of Lords Cases 594, much stress was laid, both by the House and by the Judges who delivered their opinions upon the questions submitted to them, upon the circumstance of the
*87] *instrument having been drawn by a person who was evidently well conversant with the rules which regulate the construction of wills. In truth, a will of real property is of all things the most difficult instrument to draw. Now, it seems to me to be quite plain here that the children of the tenant for life are made tenants in tail, with cross-remainders between them. If the will be read without the restraining words at the end, no room is left for doubt. The question is whether the testator thereby meant to describe the contingencies which would give rise to the limitation over to his own right heirs in fee taking effect, or whether he intended to defeat the prior limitations and prevent them from taking effect as they would have done but for those words. It seems to me that he merely intended to describe those contingencies, and that he has failed to do this with accuracy. The difficulty arises from the use of the word "child" in this part of the will,—"And in case of the death of my said daughter Ann James without leaving any *child* her surviving, and in the event of such *child or children* her surviving and dying without leaving any issue of his or her body, then in trust for my own right heirs for ever." The party who drew the will has here inaccurately used the words "child or children" instead of "issue" or "descendants." There

was a case in this court which did not occur to me during the argument, of Doe d. Blesard *v.* Simpson, 3 Scott N. R. 774, 3 M. & G. 929 (E. C. L. R. vol. 42). The words of the devise there were,—"I give, devise, and bequeath to my son Dr. J. S., his *heirs* and assigns for ever, &c.: but, if it shall happen my said son shall die *without leaving any child or children*, in that case I give, devise, and bequeath all the before-mentioned estates, &c., unto my five (natural) children (naming them), their heirs and assigns for ever, to be equally divided *amongst them share and share alike: and, if any of my said five children [*88 should die before they come of age, without *issue*, such share of him, her, or them so dying shall go equally amongst the survivors: my will also is, and I hereby order and direct, that, if my present wife E. should leave no *issue* to inherit the freehold estate at H., that all the said estate (at H.) shall be subject to the same mode of distribution amongst my aforesaid five children as all the other property above mentioned given and bequeathed to my said son Dr. J. S. in case he die without *issue*:" and the Court construed the words "child or children" in the sense of "issue" generally. I think we do no real violence to the language of the will by holding that the testator in the last clause inaccurately describes the two events in which the prior limitations in his will would fail to take effect. I feel the full force of what has fallen from my Brother Williams; and I always entertain the most profound respect for any doubt which he expresses, especially upon questions of this kind: but, at the same time, I cannot help entertaining a strong opinion that the doubt in this case is unfounded, and that, upon the reasonable and fair construction of this will, our judgment must be for the defendant.

KEATING, J.—Although I have been much struck by the doubts suggested by my Brother Williams, yet, upon the whole, I come to the conclusion arrived at by the rest of the Court, viz., that Thomas Davies James, the son of Ann James, the testator's daughter, took a vested estate tail under the will. In construing a will, we are bound, if possible, to give effect to every part of it. Now, there seems to me to be one prevailing intention on the part of the testator throughout this will; and that is, that his right heirs *shall not take until [*89 all the issue of his daughter Ann James shall be exhausted. That intention is plainly expressed in the second branch of the will. The question is, whether there is anything in the ultimate limitation, "in case of the death of my said daughter Ann James without leaving any child her surviving, and in the event of such child or children her surviving and dying without leaving any issue of his or her body," which can prevent that intention from having effect. It seems to me, that, without at all straining the language of the will, the children of Ann James were to take vested estates tail, with cross-remainders between them, with all the legal incidents of such estates, one of which is, the power of barring the ultimate limitations over by the execution of a disentailing deed. The defendant, therefore, is entitled to judgment. Judgment for the defendant.(*a*)

(*a*) This judgment was affirmed by the Exchequer Chamber, on appeal, at the sittings in Error after Hilary Term 1863.

*90] *SACK v. FORD. *Nov.* 20.

By a charter-party the owner agreed to let and the charterer to hire the ship for a certain period, the ship, being in good and working order, and her master, officers, and crew being duly shipped, to be placed at the disposal of the charterer in the port of London on a given day, and the hire to commence from and after the time that she should have been placed at the disposal of the charterer with a clean and clear hold and ready to load. It was further stipulated, that the owner was to appoint, victual, and pay the master, officers, and crew, and to provide and pay for the necessary equipment for the working of the ship, and to pay all other charges whatsoever, save and except for coals, pilotages, port-charges, and labour, which were to be paid by the charterers; and that *the cargoes were to be taken on board and discharged by the charterers, the crew of the vessel rendering customary assistance so far as they might be under the orders of the master; and the charterers were to have liberty to employ stevedores and labourers to assist in the loading, stowage, and discharge thereof; but such stevedores and labourers being under the control and direction of the master, the charterers were not in any case to be responsible to the owners for damage or improper stowage:* and, further, that "the master and owner of the said ship should devote the same attention to the cargo, should use the same endeavours to promote despatch, and should in every respect be and remain responsible to all whom it might concern, as if the said ship was loading and discharging her cargoes and performing her voyages for account of the said owner, and independently of that charter-party:"—

Held, that there was nothing in this charter-party to exonerate the owner from responsibility for negligent and improper stowage by the stevedores employed by the charterer under the above stipulation.

THIS was an action brought by the plaintiff, the charterer of the ship Imperial, against the defendant, the owner, for alleged negligence and improper conduct in the stowage of the cargo, whereby certain oats became heated and spoiled. The declaration was in the ordinary form, setting out the charter-party, and alleging a breach as above.

The defendant pleaded,—first, non assumpsit,—secondly, a traverse of the breach alleged,—thirdly, that the damage complained of was occasioned by perils of the sea, which were excepted by the charter-party. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Guildhall after last Term. The charter-party, which was dated the 6th of March, 1861, was put in, and was as follows:—

"It is this day mutually agreed between Messrs. Ford & Jackson on the part of the master or owners of the screw steamship or vessel called the Imperial, of the measurement of 483 tons or thereabouts, eighty horse power, now under time charter, whereof Robert Warburton is at present master, and Messrs. W. F. Sack & Son, of London,
*91] charterers of the said ship or *vessel, that the said ship, being tight, staunch, strong, and in every way fitted for the intended voyage or voyages, being at present classed A. 1, in Lloyd's register, her boilers and machinery being in a good and efficient state and in perfect working order, and her master, officers, and crew being duly shipped, shall be *placed at the disposal of the charterers* in the port of London, not before the 15th of March nor after the 31st day of March; and that during the currency and continuance of the hiring under this charter-party the said ship shall in every respect be so maintained by the owners: The master and owners hereby guaranty that the said ship shall, if required by the charterers or their agents, take on board on any voyage at least 630 tons dead weight of cargo and coals, including bunkers: The owners agree *to let* and the charterers agree *to hire* the said ship for a term of not less than one hun-

dred and eighty running days, and not exceeding three hundred and sixty-five running days, or any intermediate time, at the option of the charterers: The hire of the ship is to commence from and after the time that she shall have been placed at the disposal of the charterers in London with a clean and a clear hold and ready to load, and in every respect prepared as hereinbefore agreed, and notice thereof shall have been given in writing to the charterers; and the said hire shall cease and determine on the day the ship shall be replaced with a clear hold at the disposal of the owners, either in London, Liverpool, or a coal-shipping port in the United Kingdom, at charterers' option, of which at least fourteen days' notice is to be given in writing by the charterers to the master or owners; but the said hire is not to become due or to be paid for all or any such day as the ship, boilers, or machinery may be under repair, if for more than twenty-four running hours, so as in anywise to *obstruct or impede her loading or discharge or prevent her proceeding on her voyages, nor if, [*92 whilst proceeding from port to port, the ship, boilers, or machinery become in any manner disabled, if for more than twenty-four running hours, and in this latter case all extra port charges, extra pilotages, and extra labour shall be borne by the owners; and the payment for hire is to recommence the day after the ship and her boilers and machinery are again in a good and efficient state and in thorough working order: Should the ship be lost, the hire is to cease and determine on the day of her departure from her last port of loading or discharge: The log-book of the ship is to be exhibited to the charterers when required by them: and should it occur that the steamer be prosecuting a voyage at the time of the expiration of the period for which the vessel is hired, it is agreed that the said voyage shall be continued upon the terms and conditions of this charter: The owners are to appoint, victual, and pay the master, officers, and crew of the steamer, are to provide and pay for the necessary equipment for the proper working of the said steamer, and are also to pay all and every other charges and expenses whatsoever, save and except for coals, pilotages, port-charges, and labour, which are to be paid by the charterers: The entire capacity of the ship is to be placed at the disposal of the charterers for the shipment of all such lawful goods and merchandise, live stock, and fuel as they or their agents may tender alongside for shipment, sufficient room being reserved to the owners for the ship's necessary tackle, apparel, provisions, and furniture, and at least thirty tons of full or deck cargo shall be carried on deck at shipper's risk, if required by the charterers, provided the vessel has not more on board than six hundred and thirty tons dead-weight cargo and coals before mentioned, including the thirty tons on *deck, and if not prejudicial to insurance: The steamer is to be employed between safe [*93 ports in Europe, or places washed by Mediterranean or Adriatic waters: It is clearly understood, that, in the event of the steamer becoming in any manner disabled, and putting into any other port or ports than those to which she is bound, the charterers are not in any case to be liable for the extra port charges, extra pilotages, or extra labour: The ship, being so loaded, shall therewith immediately proceed to such safe ports or places (including any docks, wharves, or quays thereat) as the charterers or their agents may direct; and, should

the charterers send the steamer from the Baltic, White or Black Sea or British North America, between the 1st of October and the 1st of April, or from the West Indies between the 1st of August and the 12th of January, or to the Azores, or to sail to the Baltic, before the 20th of March or after the 10th of September, they shall pay to the master or owners of the steamer any extra insurance that may be paid for or in consequence thereof by the owners: Act of God, Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said letting and hiring always mutually excepted: Bills of lading are to be signed at any rate of freight, made payable in any manner the charterers or their agents may choose, without prejudice to the stipulations of this charter-party; and the master is to attend daily at the office of the charterers or of their agents or representatives, for the purpose of signing such bills of lading: The cargoes are to be taken on board and discharged by the charterers, the crew of the vessel rendering customary assistance so far as they may be under the orders of the master; and *the charterers* *94] *are to have liberty to *employ stevedores and labourers to assist in the loading, stowage, and discharge thereof, but such stevedores and labourers, being under the control and direction of the master, the charterers are not in any case to be responsible to the owners for damage or improper stowage.* The vessel is to be addressed at all ports and places of loading and discharge to the charterers' agents, whom the masters and owners hereby accept as the agents of the vessel; and the steamer is to comply with the Admiralty regulations, should she be required to take government stores; but any expenses involved in such regulations to be borne by the charterers: The brokerage is 5 per cent. upon the hire as received, and is due from the owners of the steamer to the brokers, Harnett, Honey & Co.; and a commission of 2½ per cent. on the amount of hire is to be paid by the master or owners (in lieu of address commission) to the charterers, and is to be deducted from the hire, on payment thereof: The master and the owners of the said ship shall devote the same attention to the cargo, shall use the same endeavours to promote despatch, and shall in every respect be and remain responsible to all whom it may concern, as if the said ship was loading and discharging her cargoes and performing her voyages for account of the said owners, and independently of this charter-party: In consideration whereof, the charterers shall pay or cause to be paid for the use and hire of the said ship in respect of the said term, the sum of 18*l.* 10*s.* sterling for each and every day that the vessel shall be employed by them as aforesaid: Payment thereof is to become due and be payable in British cash every fifteen running days during the continuance of this charter: Failing the payment of hire stipulated, the owners to be at liberty to withdraw the vessel from the service of the charterers, and claim damages, with any hire that may be due.

*95] *"Signed, subject to the present charterers delivering her up in London before the 31st of March."

The charterers took possession of the Imperial under this charter-party, and she performed several voyages. In May, 1861, she started from London for Stettin; and on the 4th of June she began taking in her homeward cargo, which consisted principally of spelter and oats

the property of different persons. The agent of the plaintiff at Stettin employed licensed stevedores to assist in stowing the cargo, the stowage of which (according to the evidence given by the master) he himself superintended. The master, however, was on board all the time: and it was proved that he occasionally interfered by giving directions to the crew and labourers employed in stowing the cargo. Part of the spelter was placed at the bottom of the ship's hold; but about ten tons of it was placed at the top. On the arrival of the ship in London, the oats were found to be much heated and damaged, owing, as the plaintiff's witnesses swore, to the improper stowage. The evidence upon this subject, however, was very contradictory.

On the part of the defendant, it was submitted, that, inasmuch as the stevedores were employed by the plaintiff's agent, and the stowage superintended by him, the defendant was not responsible for any negligence of which they were guilty; and that the evidence failed to establish a case of negligence.

The Lord Chief Justice ruled, that, by the terms of the charter-party, the defendant made himself responsible for negligence on the part of those employed to stow the cargo; and he left it to the jury to say whether or not there had been negligent and improper stowage, and whether the damage to the oats was occasioned thereby.

The jury answered both these questions in the *affirmative, and accordingly returned a verdict for the plaintiff, damages 132*l.* 7*s.* 3*d.* [*96

Shee, Serjt., on a former day in this term, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a nonsuit.—He submitted that the charter-party amounted to a demise of the ship, that the stevedores whose negligence occasioned the damage were employed by the charterer, and that the stipulation that they were to be paid by the owner did not render the latter responsible for the negligent performance of the work by them. He referred to Blaikie *v.* Stembridge, 6 C. B. N. S. 894 (E. C. L. R. vol. 95). There, the ship was chartered by the owner to one Gallard for a voyage with cargo from London to Port Louis and back, for a stipulated rate of freight per ton on the homeward cargo, the cargo to be taken to and tendered alongside at the charterer's risk and expense, the ship to be consigned to charterer's agents at ports of loading and discharge, and *a stevedore for the outward cargo to be appointed by the charterer, but to be paid by and to act under the captain's orders.* The charterer put up the ship as a general ship for Port Louis, and appointed a stevedore, who with his men went on board for the purpose of stowing the vessel, in the usual course of his business. The master gave no orders to or in any way interfered with the stevedore, only looking into the hold occasionally to see how the cargo was being stowed, for the safety of the ship. The plaintiff's agent arranged with the broker of the charterer for the freight and carriage to Port Louis of certain sugar-pans, and sent them alongside the ship. Whilst the pans were being hoisted on board from the lighter *by the stevedore and his men*, two of them were by their negligence damaged. And it was held by this Court, that, under the circumstances, the stevedore was not the servant or agent of the *master, so as to make him responsible; and the Exchequer Chamber affirmed that decision,—6 C. B. N. S. 911. [*97

Lush, Q. C., and *Honyman* now showed cause.—The question is. what is the effect of the stipulation in the charter-party, that "the charterers are to have liberty to employ stevedores and labourers to assist in the loading, stowage, and discharge of the cargo; but, such stevedores and labourers being under the control and direction of the master, the charterers are not in any case to be responsible to the owners for damage or improper stowage." It is hardly possible to conceive language more clearly indicative of an intention that the owners are to be responsible for bad stowage, just as if they had put up the ship themselves as a general ship. What other damage could the parties have contemplated? To whom could any responsibility be incurred by reason of improper stowage, but to the owners of the goods? It is clear upon the face of the whole charter-party that the owners did not mean to part with the possession of the ship or their lien upon the cargo for the stipulated freight. The case of Blaikie *v.* Stembridge in reality has nothing to do with the question. The charter there was by the owner, and the action was brought against the master. The decision proceeded upon the general duty of the master in respect of the stowage of cargo. "By the maritime law," says Willes, J., in delivering the judgment of the Court, "in the absence of custom or agreement to the contrary, it is the duty of the master, on the part of the owner, to receive and properly stow on board the goods to be carried; which, ordinarily, are to be delivered to him alongside. For any damage to the goods occasioned by negligence in the performance of such duty, the owner is liable to the shipper. If *the damage result from misconduct of the master, he is answerable to the owners, and probably also directly to the shipper." It was in order to escape from the consequences of that decision that the special clause was introduced into this charter-party. It is impossible to conceive words more apt to relieve the charterers from responsibility and to cast it upon the owners. The stipulation at the end of the charter-party, that "the master and the owners of the said ship shall devote the same attention to the cargo, shall use the same endeavours to promote despatch, and shall in every respect be and remain responsible to all whom it may concern, as if the said ship was loading and discharging her cargoes and performing her voyages for account of the said owner, and independently of this charter-party," is also strong to show that the appointment of the stevedores was not intended to relieve either the master or the owners from the obligation to use due care and skill in the loading and unloading of the cargo. The ground upon which the Court of error rested its judgment in Blaikie *v.* Stembridge, was, that there was no *contract* with the master, and no wrongful act done by him or by any person for whose acts he was responsible. The decision of the Court below was little more than a recognition of the principle laid down in Swainston *v.* Garrick, 2 Law J., Exch. 225, where it was held that the appointment of a stevedore by the charterer relieved the master from responsibility for bad stowage. Many reasons may be suggested why the charterer should wish to have a competent and experienced set of men employed in loading and unloading. He is interested in having the cargo stowed quickly, because he is paying a large sum per day for the hire of the vessel; and in having it stowed well,

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because, though he might have a remedy over against the owner of the ship, he would rather not have an action *brought against him by the owner of the goods. [BYLES, J.—Further, he is interested in making the most of the room.] [*99

Shee, Serjt., and *David Keane*, in support of the rule.—It must be conceded that the charter-party does not amount to a demise of the ship: the owner did not so entirely part with the possession of the vessel as to deprive him of a lien upon the goods put on board for the stipulated freight. The simple question is, what is the meaning of the clause which provides that "the charterers are to have liberty to appoint stevedores and labourers to assist in the loading, stowage, and discharge of the cargo, but that such stevedores and labourers being under the control and direction,"—that is, subject to the orders, —"of the master, the charterers are not in any case to be responsible to the owners for damage or improper stowage?" The object of employing stevedores, is, to relieve the master from responsibility as to stowage. In order to sustain the contention on the part of the plaintiff, the argument must go the length of saying that the owner is to be liable even though the damage arose from the acts and default of the charterer himself, and the damage was done to his own goods. It is in truth an attempt to turn the proviso that the charterer shall *not* be responsible for improper stowage into an affirmative stipulation that the owner *shall* be, even though the bad stowage was the act of the charterer or his agents. At the close of the judgment in Blaikie *v.* Stembridge, the Court say: "After a diligent search, we have not found any authority for the position that a person sending goods to be loaded on board a general ship is entitled to assume, without inquiry, that his goods are to be shipped and stowed by the master, rather than by a stevedore, and so, without any contract with or wrong *done by the master or crew, to insist upon holding the master liable." The object of the last clause of this charter-party was, to preserve to the owners of the goods a remedy against the shipowner for any neglect or misconduct on the part of the master and crew, and to protect the charterers to that extent, who but for this clause would have been responsible for the acts of the master, who, by the terms of the charter-party, had become their servant. In Blaikie *v.* Stembridge, the stevedore was to be paid by the owners: here, they are to be selected and paid by the charterer. [*100

ERLE, C. J.—I am of opinion that this rule must be discharged. The question turns upon the construction of the charter-party which is before us. Ordinarily speaking, the shipowner has by law cast upon him the risk attending the loading, stowing, and unloading of the cargo: and the question is, whether by the terms of this charter-party he is exempted from that liability. I think not: on the contrary, it appears to me that the charterer, seeing what were the consequences resulting from the decision in Blaikie *v.* Stembridge, has expressly stipulated that the liability of the owner for bad stowage shall continue, notwithstanding that the charterer was to have liberty to employ stevedores and labourers to assist in the loading, stowage, and discharge of the cargo. The first clause which relates to cargo provides that "the cargoes are to be taken on board and discharged by the charterers, the crew of the vessel rendering customary assist-

ance, so far as they may be under the orders of the master." That plainly contemplates that the master and crew shall be on board acting in the performance of their ordinary duty. But, as greater expedition in the loading and stowage may be desirable, the contract provides that "the charterers are to have liberty to employ stevedores and *101] *labourers *to assist* in the loading, stowage, and discharge thereof; but that, such stevedores and labourers being under the control and direction of the master, the charterers are not in any case to be responsible to the owners for damage or improper stowage." That clause expresses in as plain terms as it is possible to conceive, that the charterers are to have the option of employing stevedores to assist in the stowage, but that they are still to hold the owners responsible for improper or negligent stowage. That seems to me to be the only meaning the contract is susceptible of: and, it being proved here that the damage to the oats did arise from improper stowage, I think the plaintiff is entitled to recover. The last clause, which provides that "the master and the owners of the said ship shall devote the same attention to the cargo, shall use the same endeavours to promote despatch, and shall in every respect be and remain responsible to all whom it may concern, as if the said ship was loading and discharging her cargoes and performing her voyages for account of the said owner, and independently of this charter-party,"—is but a repetition of the same idea. It seems to have been added ex abundanti cautelâ, in case any doubt should arise upon the former part of the charter-party, and was intended to provide, that, notwithstanding the employment of stevedores to assist, that circumstance should in no degree alter the responsibility of the master and owner.

WILLIAMS, J.—I am quite of the same opinion. At first I was inclined to think that this case was very nearly governed by Blaikie *v.* Stembridge: but I am now satisfied that that case has no influence at all upon the present. The stipulation in the charter-party there, was, that the stevedore was to be appointed by the charterer, but to *102] be paid by and to act under the *captain's orders. The clause in question in this charter-party seems to have been expressly framed with a view to prevent that case applying: and it seems to me to amount to this, that the charterers shall not in any case incur responsibility, but that the ordinary legal responsibility of the master and owner shall continue, notwithstanding the charterers may choose to avail themselves of the power reserved to them to appoint stevedores to assist. Upon the whole, for the reasons given by my Lord, I think we are not fettered by any authority, and that the true construction of this charter-party is that which he has put upon it.

BYLES, J.—I entirely agree with my Lord and my Brother Williams. When the case of Blaikie *v.* Stembridge comes to be looked at, the distinctions pointed out by Mr. *Lush* put it entirely out of view. There are no such negative or positive words to be found in the charter-party there as are found here; and the action was brought against the master. There was no duty cast upon the master there; whereas here the duty of the master and owner forms the substratum on which the plaintiff's action reposes. My Brother Willes, in delivering the judgment of the Court, there says: "By the maritime law, in the absence of custom or agreement to the contrary, it is the duty

of the master, on the part of the owner, to receive and properly stow on board the goods to be carried; which, ordinarily, are to be delivered to him alongside. For any damage to the goods occasioned by negligence in the performance of such duty, the owner is liable to the shipper." Here, then, it was the duty of the master to receive and properly stow the goods,—the charterers being at liberty to employ stevedores and labourers to assist. The jury have found that the damage *complained of was the result of negligence. It is said [*103
that that negligence was the negligence of the charterer's own servants. But that is, as it seems to me, begging the whole question; for, the charter-party expressly stipulates that the stevedores and labourers so employed by the charterers, being under the control and direction of the master, the charterers are not in any case to be responsible to the owners for damage or improper stowage. The master is to have the control of the stevedores,—to tell them what they are *not* to do; and he is to have the direction,—to tell them what they *are* to do. If any difference of opinion should arise as to the proper mode of stowage, between the stevedore and the master, that of the latter is to prevail. I must confess I should have thought the negative words enough. But all possibility of doubt is, I think, removed by the positive words at the end,—"The master and the owners of the said ship shall devote the same attention to the cargo, shall use the same endeavours to promote despatch, and shall in every respect be and remain responsible to all whom it may concern, as if the said ship was loading and discharging her cargoes and performing her voyages for account of the said owner, and independently of this charter-party." That being so, the liability of the owner would have rested upon the general law laid down in the case cited. I own I think this a very plain case.

KEATING, J.—I am of the same opinion. The damage here arose from what the jury have found to be improper stowage, viz., placing the spelter over the oats; and that was done with the knowledge and consent of the master. Under the terms of this charter-party, the master had the power to control that stowage. The stevedores and labourers whom the *charterers were to be at liberty to employ [*104
were to be under his direction; and the charterers are expressly exempted from all liability. If it had rested there, I should have had no hesitation in agreeing with the conclusion the rest of the Court have come to. But, if any doubt could have existed, it would vanish when the last clause was looked at. With all due deference to my Brother *Shee's* argument, I think it would have been difficult to select words more clearly calculated to fix the liability for improper stowage upon the owners. Rule discharged.

Shee, Serjt., asked leave to appeal. He, however, stated that the point was reserved to him only upon the understanding that the defendant was to rest satisfied with the decision of this Court.

WILLIAMS, J.—I think we have no power to relieve you from the agreement which you entered into at Nisi Prius.

Leave to appeal refused.

*105] *CASTELLAIN and Others *v.* THOMPSON and Another.
Nov. 21.

THOMPSON and Another *v.* CASTELLAIN and Others.

T. & Co., the owners of flats or barges at Liverpool, were employed by H. & Co. to carry certain copper-ore to one L., the owner of crushing-mills at Birkenhead, who, in consideration of being employed to crush the ore, agreed to indemnify H. & Co. against all risk in the transit. Whilst on its way to Birkenhead, the barge with the ore on board foundered in the river. T. & Co. thereupon gave notice of the loss to H. & Co., and requested to be employed to raise the cargo, to which a clerk in the employ of H. & Co. replied,—"We have nothing to do with it: you had better see Mr. L. He has the management of it." T. & Co. then went to L., who said,—"Oh: I am all right. I am insured with M.;" and, in answer to a suggestion of T. & Co. as to the necessity for prompt action, he added: "You had better prepare for getting it up; but you must go to M. for orders." T. & Co. then went to M., who said: "You had better go on with it, and do the best you can for us." T. & Co. thereupon proceeded with the work, and, after incurring great labour and expense, succeeded in recovering the ore.

H. & Co. afterwards tendered the sum agreed to be paid for the carriage of the ore to Birkenhead, and demanded it: but T. & Co. refused to part with it, claiming a lien upon it for the expenses incurred in raising it from the bottom of the river:—

Held, that there was no contract for the work done, as between T. & Co. and H. & Co., in respect of which such claim of lien could be sustained.

And held, that T. & Co. could not under the circumstances set up a claim for either general average or for salvage.

Quære, under what circumstances a man is entitled to sue or to assert a lien for work bestowed upon a chattel, whereby its value is increased?

THIS was a special case stated for the opinion of this Court, without pleadings, pursuant to a Judge's order under the Common Law Procedure Act, 1852:—

1. The first of these actions is brought by the plaintiffs therein against the defendants for the recovery of damages for the detention of a cargo of copper-ore.

2. The second action is brought by the plaintiffs against the defendants for the recovery of the sum of 1075*l.* 3*s.* 2*d.*, for work and labour and expenses, under the circumstances hereinafter mentioned.

3. Alfred Castellain, Frederick Huth, Louis Gruning, John Frederick Gruning, Charles Frederick Huth, Daniel Meinertzhagen, Henry Huth, and Louis Huth, have for several years carried on and do still carry on the business of merchants in copartnership together under the firm of Frederick Huth & Co.; and John Thompson and George Paull have for several years carried on and do still carry on business under the firm of Thompson & Co., at Liverpool, and are the owners of flats and barges; and part of their business consists in conveying
*106] on the said barges and flats, for reward *in that behalf, the goods and merchandise of other persons from dock to dock in the port of Liverpool and Birkenhead, or to adjacent places on the river Mersey, upon such terms as they may from time to time agree upon when so employed.

4. In the month of July, 1861, Huth & Co. were the owners of a large quantity of copper-ore which had then arrived from New York in a vessel called the Bridgewater; and the said vessel, with the said copper-ore on board of her, was afterwards moored and lay at anchor close to the Harrington Quay, in the port of Liverpool. Whilst the said vessel with the said copper-ore on board of her was lying near the Harrington Dock Quay as aforesaid, Messrs. Huth & Co. sent a

message to Thompson & Co., requesting them to send a flat alongside the said vessel Bridgewater to receive therefrom the said copper-ore, and to convey the same to Birkenhead, and there deliver the same to one Lewis, who was the proprietor of certain crushing-mills at Birkenhead, and who, being desirous of crushing the said ore, had agreed, upon consideration of being employed to do so, to indemnify Messrs. Huth & Co. against all risk to the said ore in the transit from Liverpool to Birkenhead. The exact relation of Lewis to Messrs. Huth & Co., and to the said owners, was unknown to the said Messrs. Thompson & Co., until long after the several transactions in the case mentioned.

5. Messrs. Thompson & Co. assented to the said request; but there was no written agreement come to as to such conveyance of the copper-ore to Birkenhead. It was, however, understood and agreed that Messrs. Thompson & Co. should convey the said copper-ore at the same rate as that at which they had previously conveyed ore for Messrs. Huth & Co., viz., at 1*s.* per ton.

6. In compliance with the aforesaid request, Messrs. Thompson & Co. sent a flat or barge called the Venus to the said vessel the Bridgewater; and, having *received the said copper-ore upon the Venus, proceeded to convey the same on the Venus to Birkenhead. [*107

7. Whilst the Venus was proceeding as aforesaid to Birkenhead with the said cargo of copper-ore on board of her, she foundered, by reason of foul weather, and without any fault of Messrs. Thompson & Co., and went, together with her said cargo, to the bottom of the river Mersey on the night of the 22d of July, 1861.

8. On the 23d of July, 1861, Mr. Paull (Thompson's partner) called at the office of Messrs. Huth & Co., and told one of their clerks that the Venus and her cargo of copper-ore had sunk in the river Mersey, and requested to be employed for the purpose of raising the said cargo; whereupon the said clerk, being a person having authority to answer the inquiry, replied,—"We have nothing to do with it. You had better see Mr. Lewis. He has the management of it." Thereupon Paull waited upon the said Mr. Lewis, and made the same statement to him; and Mr. Lewis said to him: "Oh; I am all right. I am insured with Langton for 6500*l.*" The said Mr. Paull said: "We ought to go on with the work without delay, if we are to do it:" and Mr. Lewis replied: "You had better prepare for getting it up; but you must go to Mr. Langton for orders." Paull having accordingly called upon the said Mr. Langton (who is an insurance broker at Liverpool), made the same statement and request to him; and, having also told him that his firm had great experience in such jobs, received the following answer from Mr. Langton, that is to say, "Well: you had better go on with it, and do the best you can for us;" whereupon Messrs. Thompson & Co. proceeded to attempt to raise the said flat and copper-ore, and, after the lapse of some weeks, succeeded in so doing, and conveyed the said copper-ore afterwards to Birkenhead. After the said copper-ore had been so *raised and conveyed to Birkenhead aforesaid, Messrs. Huth & Co. tendered to Messrs. Thompson & Co. the amount due to the latter for the carriage of the said ore to Birkenhead, and then demanded the said ore from Messrs. [*108

Thompson & Co. But Messrs. Thompson & Co. refused to give up to Messrs. Huth & Co. the possession of the said copper-ore, and claimed a lien on it for the expenses incurred by them, and for money due to them for work done and materials provided by them in and about raising the said copper-ore, and detained the copper-ore from Messrs. Huth & Co. for a long time under such alleged claim of lien.

9. Messrs. Thompson & Co. did not ever give any notice according to the 450th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), to a receiver of wrecks, of their having found or taken possession of the Venus and her cargo of copper-ore when so sunk as aforesaid in the river Mersey.

10. The Court were to be at liberty to draw such inferences of fact as a jury might draw.

11. The questions for the opinion of the Court were,—first, whether, under the above circumstances, Messrs. Thompson & Co. were entitled, after the said copper-ore had been raised and conveyed to Birkenhead as aforesaid, to any lien on the same for money which they claimed from the said Messrs. Huth & Co., as aforesaid; and whether, after the said tender, the said Messrs. Huth & Co. were entitled to possession of the said copper-ore as against the said Messrs. Thompson & Co.,—secondly, whether Messrs. Thompson & Co. were entitled to recover from Messrs. Huth & Co. the moneys claimed in the second action.

12. If the Court should be of opinion that Messrs. Thompson & Co. were not entitled to any such lien, and that Messrs. Huth & Co., after the tender, were entitled to possession of the said copper-ore as against
*109] *Messrs. Thompson & Co., then judgment was to be entered up for the plaintiffs in the first action for their costs of suit, and for the damages sustained by the plaintiffs by reason of the defendants' detention of the said copper-ore, the amount of such damage to be settled by arbitration; the arbitrator to be named, if necessary, by the Court.

13. If the Court should be of a contrary opinion, then judgment of non pros., with costs of defence, was to be entered up for the defendants.

14. If the Court should be of opinion, that, in the second action, Messrs. Thompson & Co. were entitled to recover, then judgment was to be entered up for the plaintiffs in the second action, for such sum of money as an arbitrator, to be named (if necessary) by the Court, should decide that they are entitled to.

15. If the Court should be of a contrary opinion, then judgment of non pros., with costs of defence, was to be entered up for defendants in the second action.

16. If either party succeeds in both actions, that party to have the costs of the special case; otherwise the costs to be paid in such manner as the Court may direct.

Aspinall, for Messrs. Thompson & Co., the defendants in the first
*110] action, plaintiffs in the second.(a)—The *main questions for the consideration of the Court are,—first, whether Thompson &

(a) The points marked for argument on the part of Thompson & Co. were as follows:—
As to the first action,—"1. That Thompson & Co. are entitled to retain as against Huth & Co.

Co. are under the circumstances entitled to sue Huth & Co. for the expenses incurred by them in raising the copper-ore,—secondly, whether Thompson & Co. had a lien on the property saved. It is submitted that there is enough stated in the case to show that Thompson & Co. might reasonably suppose they were employed on behalf of Huth & Co. to do this work. They had been retained by Huth & Co. to carry the ore to Lewis, at Birkenhead. The vessel in which they were conveying it having foundered, Paull, Thompson's partner, gave notice of the loss to a clerk of Huth & Co., and requested to be employed to raise the sunken cargo; whereupon the clerk referred him to Lewis as having the management of the matter. On going to Lewis, Paull was informed that he (Lewis) was insured with Langton, to whom he referred him for orders. Paull thereupon went to Langton, who requested him to "do the best he could for him." Thompson & Co. then made preparations for raising the flat and recovering the ore, which, after incurring great expense, they succeeded in doing. There is sometimes a distinction between a right of lien and a right to sue for work bestowed upon a chattel whereby its value is increased: but that distinction cannot prevail here. The case of Williams *v.* Allsup, 10 C. B. N. S. 417 (E. C. L. R. vol. 100), is in principle in perfect analogy with the present. It was there held, that the mortgagee of a ship, who remains in the ostensible ownership, has an implied authority to *confer a right of lien for repairs necessary to keep her seaworthy,—notwithstanding the 70th section of the Merchant [*111 Shipping Act, 1854 (17 & 18 Vict. c. 104), which enacted that "a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship, or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage-debt." Erle, C. J., in giving judgment, says: "I put my decision on the ground suggested by Mr. *Mellish*, viz. that the mortgagee having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage-debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose." And, after referring to the 70th section of the Act, he adds: "The implication upon which I found my judgment is quite consistent with that provision. The vessel has been kept in a state to be available as a security to the mortgagee, by her destruction being prevented by the repairs which the defendant has done to her." So, here, the labour bestowed upon the ore by Thompson & Co. preserved the defendants' property, which otherwise would have been altogether

the said copper-ore, until paid the amount of work and expenses by them expended thereon under the circumstances stated in the special case:

"2. That they have a lien on the said copper-ore for the amount of the said labour and expenses:

"3. That, in that action, judgment of non pros., with costs of defence, should be entered up for the defendants."

As to the second action,—"1. That Thompson & Co. are entitled to recover as against Huth & Co. the amount of work and expenses by them expended in and about the said copper-ore under the circumstances stated in the special case:

"2. That, in that action, judgment should be entered up for the plaintiffs for the amount of such work and expenses, to be ascertained as in the special case stated."

lost to them. Not knowing the terms of the bargain between Huth & Co. and Lewis, Thompson & Co. had a right to assume that the latter was their agent, and authorized to deal with the ore on their behalf: and, having by their conduct led Thompson & Co. into a belief of the existence of that state of things, they are estopped, by the doctrine of Pickard *v.* Sears, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 488, Gregg *v.* Wells, 10 Ad. & E. 90 (E. C. L. R. vol. 37), 2 P. & D. 296, Freeman *v.* Cooke, 2 Exch. 654,† and Cornish *v.* Abington, *112] 4 Hurlst. & N. 549,† from controverting the lien of Thompson & Co. in respect of the labour and expense they were thus induced to bestow and incur in recovering the ore. Further, Thompson & Co. are entitled to claim the expenses incurred by them as general average. The ore was on board their vessel, sunk at the bottom of the river: and the expense was incurred in recovering the vessel and her cargo. "General average," says Mr. Maclaclan, on Shipping, p. 556, "denotes that contribution which is made by all who are parties to the same adventure towards a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, by some of them for the common benefit of ship and cargo." And he adds: "For this rule of general average the world is indebted to the ancient laws of Rhodes, through the tradition of the jurists of Rome. It is deeply founded in the principles of natural justice; and it is commended by practical wisdom and equity to adoption among commercial nations wherever and so long as maritime traffic is a pursuit." The definition of general average is given in similar terms in 2 Arnould on Insurance, 2d edit. 895. And the ordinary mode of enforcing the claim is setting up a lien on the goods: 2 Arnould 965, citing Story, who says,—"The general maritime law gives a lien in rem for the contribution, not as the only remedy, but in many cases as the best, and in some the only remedy, as, where the owner of the goods is unknown. Indeed, it may be asserted with entire confidence, that, in many cases, without such a lien, the shipowner would be without any adequate redress, and would encounter most perilous responsibility." [ERLE, C. J.—General average as between assurer and assured is one thing, between shipper and shipowner is another.] Arnould, quoting the language of Lawrence, J., in Birkley *v.* Presgrave, 1 East 220, says,— *p. 895,—"A general average loss may be defined to be, 'a *113] loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the joint benefit of ship and cargo.'" Again, at p. 896,—"A general average contribution may be defined to be, a contribution by all parties in a sea adventure, to make good the loss which has been sustained by one or more of their co-adventurers from sacrifices made or expenses incurred for the general benefit,"—citing Stevens on Average, 5th edit. 3. That must mean general average as between the shipowner and the owner of the cargo. [ERLE, C. J.—Scaife *v.* Tobin, 3 B. & Ad. 523 (E. C. L. R. vol. 23), is an authority for the lien as between the shipowner and the owner of the goods.] If it be said that Thompson & Co. were common carriers, the case of Brind *v.* Dale, 2 M. & Rob. 82, disposes of that. It will be contended on the other side that the right of salvage was lost by reason of the want of compliance with the 450th section of the Merchant Shipping Act, 1854. That section provides that "the fol-

lowing rules shall be observed by any person finding or taking possession of wreck within the United Kingdom, that is to say,—1. If the person so finding or taking possession of the same is the owner, he shall as soon as possible give notice to the receiver of the district within which such wreck is found, stating that he has so found or taken possession of the same; and he shall describe in such notice the marks by which such wreck is distinguished,—2. If any person not being the owner finds or takes possession of any wreck, he shall as soon as possible deliver the same to such receiver as aforesaid: And any person making default in obeying the provisions of this section shall incur the following penalties, that is to say (amongst others), He shall forfeit all claim to salvage." This, it is submitted, is not "salvage" within that clause. Nor is it "wreck" *within the definition given in s. 1,—"Wreck shall include jetsam, flotsam, [*114 lagan, and derelict found in or on the shores of the sea or any tidal water." That means wreck really and truly lost to the owner, and found again. Here, the owners never lost the knowledge of the spot where the barge was sunk.

Cohen, for Messrs. Huth & Co.(a)—There is no evidence in the case of any contract express or implied on the part of Messrs. Huth & Co. to pay Thompson & Co. any expenses they may have incurred in raising this ore. Knowing themselves to be fully insured, and the insurers being on the spot, they had no right to give, or any interest in giving, directions upon the subject. Lewis was not the agent of Huth & Co., nor did Huth & Co. by their conduct so hold him out; and therefore the doctrine of estoppel by acts and conduct *has [*115 no place here. And, assuming that Lewis was the agent of Huth & Co., it would be an agency clothed with an important discretion, which he could not delegate to Langton, by whom the direction to raise the ore was ultimately given. Nothing can be more remote from the principles which govern general average than the claim in question. The master of a ship, from the necessity of the thing, has an implied authority to sacrifice part of the cargo for the general benefit of all concerned in the adventure. If this be general average, every case of salvage would be general average. General average rests on *implied* authority. Now, here, there could be no implied authority, for Thompson & Co. were claiming to act under an express authority to raise the sunken ore. [KEATING, J.—Suppose a third person had raised it, would that have been general average?] Clearly

(a) The points marked for argument on the part of Messrs. Huth & Co. were as follows:—

As to the first action,—1. That Thompson & Co. did not by raising the copper-ore alter or improve or do work about the same, so as to give them the right of lien which they claim:

"2. That the raising of the copper-ore was not in the nature of salvage services giving to the defendants a right of lien; and, if it was, the defendants forfeited their right to salvage, and therefore their right of lien, by contravening the provisions of the 450th section of the Merchant Shipping Act, 1854:

"3. That there was no money due to the plaintiffs for which they had a right of lien."

As to the second action,—"1. That the liability of the defendants can arise only from an express or implied promise on their part to pay for the raising of the copper-ore; and that there is nothing in the special case from which any such promise can be inferred:

"2. That the raising of the copper-ore was not in the nature of salvage services; and, if it was, the right to salvage was forfeited by the plaintiffs by reason of their not having followed the provisions of the 450th section of the Merchant Shipping Act, 1854.

"3. That no action lies in a Court of law for salvage."

not. Lien is founded upon custom or contract. In Nicholson v. Chapman, 2 H. Bl. 254, a quantity of timber placed in a dock on the bank of a navigable river, being accidentally loosened, was carried by the tide to a considerable distance, and left at low water upon a towing-path. The defendant finding it in that situation, voluntarily conveyed it to a place of safety beyond the reach of the tide at high water: and it was held that he had no lien on the timber for the trouble or expense to which he might have put himself in the carriage of it, but was liable to an action of trover on refusal to deliver it up to the owner on demand, though nothing were tendered to him by the owner by way of compensation. Eyre, C. J., in delivering judgment, after disposing of the defendant's claim as one of salvage, says: "It is therefore a case of mere finding and taking care of the thing found (I am willing to agree) for the owner. This is a good office, and meritorious, at least in the moral sense of the word, and certainly *116] *entitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if it were refused, a Court of justice would go as far as it could go towards enforcing the payment. So it would, if a horse had strayed, and was not taken as an estray by the lord under his manorial rights, but was taken up by some good-natured man and taken care of by him, till, at some trouble, and perhaps at some expense, he had found out the owner. So it would be in every other case of finding that can be stated (the claim to the recompense differing in degree, but not in principle); which, therefore, reduces the merits of this case to this short question, whether every man who finds the property of another which happens to have been lost or mislaid, and voluntarily puts himself to some trouble and expense to preserve the thing, and to find out the owner, has a lien upon it for the casual, fluctuating, and uncertain amount of the recompense which he may reasonably deserve? It is enough to say that there is no instance of such a lien having been claimed and allowed: the case of a pointer dog (*a*) was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument." There is a sort of dictum there that probably an action might be maintained as upon a quantum meruit for the service rendered: but that clearly is incorrect. In Smith's Mercantile Law, 5th edit. 322, salvage is defined to be "a compensation to be made by the shipowner or merchant to other persons by whose assistance the ship or its lading may be saved from impending peril, or recovered after actual loss." In Abbott on Shipping, 10th edit. 488, "the compensation that is to be made to other persons, by whose assistance a ship or its lading may be saved from impending peril, or recovered after actual loss." And in *117] *3 Kent's Commentaries, 245 (8th edit. 311), "the compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss, in cases of shipwreck, derelict, or recapture." The mere fact of saving the property of another gives no right of lien or other compensation, unless in the case of salvage proper, salvage of ship or cargo at sea. In Smith's Mercantile Law 535, it is said: "The doctrine of lien originated in certain principles of the common law, by which a party who was *compelled* to receive the goods of

(*a*) Binstead v. Buck, 2 Sir W. Bl. 1117.

another was also entitled to retain them for his indemnity: thus, carriers and innkeepers had, by the common law, a lien on the goods intrusted to their charge;(*a*) the rescuer of goods from perils of the sea has, on grounds of public policy, a lien at common law for salvage; and it is a principle, that, where an individual has bestowed labour and skill in the alteration and improvement of the properties of the subject *delivered* to him, he has a lien on it for his charge: thus, a miller and a shipwright(*b*) have each a lien; so has a trainer, for the expense of keeping and training a race-horse,(*c*) for he has, by his instruction, wrought an essential improvement in the animal's character and capabilities, unless by usage or contract the owner has a right inconsistent with it, as, for instance, of sending the horse to run for any race he pleases, and selecting the jockey to ride him.(*d*) *And, if the owner of a stallion receive a mare for the purpose of being covered, he has a lien on her for his charge, for she [*118 will be rendered more valuable by proving in foal.(*e*) But here the rule appears to stop, and not to include cases wherein expense has been bestowed upon the object claimed to be retained, without producing any alteration in it."(*g*) The whole result of the labour bestowed by Thompson & Co. was to place the ore in a more convenient and advantageous position: there was no alteration or improvement in it which could give a right of lien. As well might the miner who raises the ore from the mine claim a lien on it for his labour. [WILLIAMS, J.—The miner never has possession of the ore: it is in his employer's possession.] Thompson & Co. are in effect setting up a lien upon the goods of Huth & Co. in respect of the debt due to them from Langton. [WILLIAMS, J.—Suppose it to be established that Thompson & Co. were employed by a person whom Huth & Co. are estopped from denying to be the true owner,—why should not Thompson & Co. have a lien upon the ore in respect of their having improved or increased the value of it by raising it from the bottom of the river? Is there any case where it has been held that the article must be physically improved?] The cases cited from Smith's Mercantile Law show that. The livery-stable keeper and the agister of cattle in a certain sense improve the animals intrusted to them, and yet they have no lien: Wallace *v.* Woodgate, R. & M. 193; Judson *v.* Etheridge, 1 C. & M. 743,† 3 Tyrwh. 954; Orchard *v.* Rackstraw, 9 C. B. 698 (E. C. L. R. vol. 67); Jackson *v.* Cummins, 5 M. & W. 342.† [WILLIAMS, J.—The true principle upon which those cases proceed is pointed out by Bayley, B., in Sanderson *v.* Bell, 2 C. & M. 304,† 4 *Tyrwh. 244; the livery-stable keeper and the agister merely supply the animals with food, bestowing on them neither labour [*119 nor skill.] The better reason is probably that given by Parke, B., in

(*a*) Skinner *v.* Upshaw, Ld. Raym. 752; Smith *v.* Dearlove, 6 C. B. 132 (E. C. L. R. vol. 60); Turrill *v.* Crawley, 13 Q. B. 197 (E. C. L. R. vol. 66).

(*b*) Ex parte Ockenden, 1 Atk. 235; Franklin *v.* Hosier, 4 B. & Ald. 341 (E. C. L. R. vol. 6); Ex parte Bland, 2 Rose 91. And see Somes *v.* The British Empire Shipping Company, 8 House of Lords Cases 338.

(*c*) Bevan *v.* Waters, M. & M. 236 (E. C. L. R. vol. 22); Jackson *v.* Cummins, 5 M. & W. 350, 351†; Forth *v.* Simpson, 13 Q. B. 680 (E. C. L. R. vol. 66).

(*d*) Forth *v.* Simpson, 13 Q. B. 680 (E. C. L. R. vol. 66). But see Allen *v.* Smith, 12 C. B. N. S. 638 (E. C. L. R. vol. 104).

(*e*) Scarfe *v.* Morgan, 4 M. & W. 270.†

(*g*) Stone *v.* Lingwood, 1 Stra. 651.

Jackson *v.* Cummins, that the occasional possession of the animals by the owner destroys the implication of lien. A common carrier or an innkeeper may claim a lien,—Skinner *v.* Upshaw, 2 Lord Raym. 752; Yorke *v.* Greenaugh, 2 Lord Raym. 866: but no case has ever extended that right to a private carrier. No action lies for salvage; the jurisdiction, where the sum is under 200*l.*, being vested in two justices, under the Merchant Shipping Act, 17 & 18 Vict. c. 104, ss. 460–463, or the Court of Admiralty where it exceeds that amount: Atkinson *v.* Woodall, 31 Law J., M. C. 174: consequently, it cannot be the subject of lien at common law. Then, this is clearly not the case of wreck within the meaning of the Merchant Shipping Act: see the judgment of Dr. Lushington in the case of The Leda, 1 Swabey's Adm. R. 40.

Aspinall, in reply.—In Scarfe *v.* Morgan, 4 M. & W. 270, 283,† Parke, B., in delivering the judgment of the Court, said: "The principle seems to be well laid down in Bevan *v.* Waters, M. & M. 235 (E. C. L. R. vol. 22), by Lord Chief Justice Best, that, where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the animal is cured of a disease, or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with natural equity, are favoured by the law, which is construed liberally in such
*120] cases." *Can it be said that the property in this ore is not improved by its being raised from the bottom of the river? This was clearly a case of general average within the definition given in the authorities already referred to. Maclachlan, at p. 570, says: "A sacrifice of money, when the expenditure incurred is for the common benefit, and not such as the shipowner undertakes by his contract to bear, is also subject of general average." In Briggs *v.* The Merchant Traders' Ship Loan and Insurance Association, 13 Q. B. 167 (E. C. L. R. vol. 66), a vessel called the Joseph Alexander, with cargo on board, abandoned by her crew at sea, was brought into harbour by salvors. The plaintiff, who was the owner of the Joseph Alexander, applied to the Court of Admiralty, and obtained possession of the ship and cargo on entering into recognisance as a security for the whole salvage; and he effected an insurance, intended to cover the proportion of the salvage he might have to pay under the recognisance. In the policy the subject-matter of insurance was described as "average expenses per Joseph Alexander." The vessel then sailed, and was totally lost with the cargo on board. The plaintiff was obliged to pay the amount of his recognisance; and, in action against the underwriters, it was held that the cargo was liable to contribute a rateable portion of the salvage; that the plaintiff, who had become liable to pay the whole salvage, had a lien on the cargo for that rateable proportion, and had consequently an insurable interest in the cargo; and that the description of the subject-matter in the policy as average expenses was sufficient. Seeing that this is an attempt on the part of Huth & Co. to get the ore out of the hands of Thompson & Co. without recompensing them for their trouble and expense in

recovering it, the Court will be disposed to draw any inference which can fairly be drawn in support of the equity and justice of the case.

*ERLE, C. J.—I am of opinion that Messrs. Huth & Co. are entitled to succeed in both actions. The action of Thompson [*121 *v.* Castellain is an action of contract; and the question is, whether the defendants entered into any contract with the plaintiffs to pay them for the labour and expense incurred by them in raising the ore from the bottom of the Mersey. It is quite plain upon the statements in the special case that Thompson & Co. did not do any work at the request of Huth & Co. All that was said by Huth & Co.'s clerk when Paull applied at their counting-house for instructions, was, "We have nothing to do with it: you had better see Lewis." It is possible that an employment by Lewis might have been good evidence of a contract by an agent of Huth & Co. But Lewis made no contract: he merely says, on being applied to, "I am all right: I am insured with Langton. You had better prepare for getting it [the ore] up: but you must go to Langton for orders." Assuming that Lewis was the agent of Huth & Co., he could not delegate his authority to a third person. But, in truth, there is no pretence for saying that Lewis was ever represented as the agent of Huth & Co. Langton was the person who employed Thompson & Co. to do the work, and to him they must look to be compensated for it.

In the action of Castellain *v.* Thompson, the question raised is, whether, as against Huth & Co., a lien was created and vested in Thompson & Co. That seems to me to involve very much the same question. The lien most relied upon by Mr. *Aspinall* was, a lien created by a contract to do the work, whereby the ore was rendered of more value to the owners. I do not decide whether Thompson & Co. would have had a lien upon the ore if they had been employed by Huth & Co. to raise it, because I am of opinion that they made no contract: neither did they hold out *anybody as being the [*122 owner of the ore, so as to estop themselves from insisting that they are the real owners. If they had done so, I am clearly of opinion that they would have been estopped from saying that the person with whom Thompson & Co. contracted upon the faith of that conduct or representation was not the true owner. Nothing that passed between Paull and Huth & Co.'s clerk amounts to such a representation: nor did that which passed with Lewis amount to a representation by Lewis,—still less a representation by the authority of Huth & Co.,—that Langton was the owner of the ore. It is true that what Lewis said amounted to a statement that Langton was the person who was ultimately liable for the loss; but there is nothing to show that the ownership of Langton was affirmed with the authority of Huth & Co. The question arises between Huth & Co. and Thompson & Co. who claim a lien. The latter have failed to establish to my satisfaction that the former in any way held out Langton as the owner of the ore, so as to estop themselves from maintaining trover for it.

I also think there is no ground for the suggestion that the lien can be insisted upon by reason of a claim for general average. The ore was sunk at the bottom of a navigable river. The claim is not in respect of expense incurred by the master or the owners for the benefit of all concerned. Nor was this a case of complete wreck: and

that was done by Thompson & Co. was done by virtue of a contract entered into with the person ultimately interested in recovering the ore. Huth & Co. and Lewis refused to employ them: Langton did employ them. Without, therefore, deciding whether the claim to general average would under other circumstances be sustainable or not, it is enough to say that the express contract *here shows *123] the capacity in which the work was done by Thompson & Co., and that that ground cannot be maintained. I also think this cannot be relied on as a claim for salvage either under the Merchant Shipping Act, 1854, or at common law.

With every desire to assist Thompson & Co., who have done meritorious service for which they ought to be paid, I am unable to discover any principle upon which they can be entitled to sue Huth & Co. for the expenses they have incurred, or to set up any claim in answer to the demand of Huth & Co. as the real owners of the ore in question.

WILLIAMS, J.—I am entirely of the same opinion. I think there was no sufficient evidence that Langton, who gave the order for raising the sunken ore, did so as the agent of Huth & Co., so as to make them liable in the first action. And, as to the second action, it appears to me that there is no evidence of any representation made by or under the authority of Huth & Co. that Langton was the real owner of the ore. If there had been evidence of that, Huth & Co. would have been estopped, and would have found themselves in no better condition as to the claim of lien than if they had been the vendees or assignees of Langton. But I see no reason to estop Huth & Co. from asserting the truth. That being so, the only question is whether Thompson & Co. could under the circumstances set up any claim for a lien at common law. It seems to me that the facts are conclusive to show that there is no pretence for a lien either in respect of general average or of salvage.

BYLES, J.—I am of the same opinion. Looking at the evidence by which it is sought to bind Huth & Co., it seems to me that no contract was made by their *clerk with Thompson & Co., nor was any *124] person represented as being authorized to contract for them. Huth & Co., therefore, are in the position of being the true owners of the goods, unencumbered by any contract in respect of them. It has been suggested that this is either a case of general average or a case of salvage. Both seem to me to be equally out of the question. This is not a case in which the master or the owners assume to act for the benefit of all concerned, as if they had been at sea: but Thompson & Co. assumed to act under an alleged contract with the person he imagined to be the true owner of the ore. I do not say that Thompson & Co. might not have had a lien as against the person who gave them the order to do the work. But that would be like the ordinary case of lien, which is good only against the person to whom the chattel belongs. The consequence is that Messrs. Huth & Co. are entitled to succeed in the action in which they are plaintiffs; and that, as they never contracted with Thompson & Co., they are equally entitled to succeed in the action in which they are defendants.

KEATING, J.—If I could have discovered any ground upon which the claim of Thompson & Co. could be supported, I should have been very glad. But really there is no evidence whatever to fix Huth &

Co. either as having made a special contract with Thompson & Co. for the raising of the ore, or to estop them from saying that the person with whom Thompson & Co. did contract was not the real owner of the ore. I therefore entirely agree in the conclusion at which my Lord and my learned Brethren have arrived.

Judgment accordingly.

*CHAMBERS *v.* MILLER and Others. *Nov.* 20. [*125

The plaintiff presented (on behalf of his employer) a check at the defendants' banking-house. The defendants' cashier counted out the amount in notes, gold, and silver, and placed it on the counter. The plaintiff took it and counted it, and was in the act of counting it a second time, when the cashier (having discovered that the drawer's account was overdrawn) demanded the money back, and, upon the plaintiff's refusal, detained him and took it from him by force:—

Held, that the property in the notes and money had passed from the bankers to the bearer of the check, and that the payment was complete and could not be revoked.

THIS was an action for an assault and false imprisonment. The defendants justified the assault under the circumstances hereinafter stated.

The cause was tried before Erle, C. J., at the sittings in London after the last Term. The facts which appeared in evidence were as follows:—The plaintiff, who was clerk to a merchant at Sunderland, went to the banking-house of Woods & Co. at that place (the defendants), and presented to one of the cashiers named Armstrong a check for 151*l.* 10*s.* 6*d.*, drawn upon the bankers by one of their customers. Armstrong,—who had been absent a few weeks from the bank, and therefore was not aware that the drawer's account was insufficient to meet the check,—received the check, and took the amount from the till in notes, gold, and silver, and placed it on the counter and went away. The plaintiff drew the money towards him, counted it over, and was in the act of counting it a second time, when the cashier (who had in the mean time ascertained on inquiry that the account of the drawer was very considerably overdrawn) returned and said that the check could not be paid. The plaintiff, however, having possession of the money, put it in his pocket; whereupon the cashier detained him until he returned the money, under a threat of giving him into custody on a charge of stealing it, and restored the check uncancelled, which was afterwards presented to the drawer and paid by him.

Upon these facts, his Lordship ruled that the property in the money had passed to the bearer of the check, and consequently that the defendants' justification failed.

*The jury returned a verdict for the plaintiff, damages 20*l.* [*126

Bovill, Q. C., on a former day in this term, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendants. He submitted, that, as the plaintiff was still counting the money at the time the payment was recalled, there had been no complete acceptance on his part to vest the property in him; and that, at all events, the money was recoverable back, as having been paid under a mistake of fact, upon the principle laid down in the cases

cited in the notes to Marriot v. Hampton (7 T. R. 269), 2 Smith's Leading Cases, 5th edit. 356, et seq.

Overend, Q. C., and *Lewers*, now showed cause.—The bankers having received the check and handed the money to the bearer, the transaction was complete, and the money became the money of the recipient, —so much so, that, if a thief had come into the banking-house and seized the money whilst the party was in the act of counting it, the loss would have been that of the presenter of the check, and not of the bankers. [ERLE, C. J.—The cashier had counted out the money and put it on the counter with the intention of paying it over in exchange for the check. The plaintiff had counted it over once, and was in the act of counting it over again, for greater caution, when he was seized.] The transaction, so far as the bankers were concerned, was fully completed. [BYLES, J.—If this had been a forged bill, instead of a check, you would hardly deny that the money might have been recovered back.] In Price v. Neal, 3 Burr. 1354, where forged bills of exchange had been accepted and paid by the drawee, *127] it was held that he could not recover *back the money from the person to whom he paid it, and who was a bonâ fide holder of the bills. Lord Mansfield said: "Here was no fraud, no wrong. It was incumbent on the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill he actually accepts; after which acceptance, the defendant innocently and bonâ fide discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged; and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on *his* side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill, from the plaintiff's having without scruple or hesitation paid the first; and he paid the whole value bonâ fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was *no* neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man: but, in this case, if there was *any* fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant." So, here, the banker is bound to know the state of his customer's account before he honours his check: the bearer can know nothing about it. [ERLE, C. J.—In Price v. Neal, the plaintiff accredited the bills by *accepting* them.(a)] That case is confirmed by Smith v. Mercer, 6 Taunt. 76 (E. C. L. R. vol. 1), 1 Marsh. 453 (E. C. L. R. vol. 4). There, the defendants took a bill accepted payable at the plaintiffs', who were the drawee's bank- *128] ers, and endorsed it to their (the defendants') *agents, to whom the plaintiffs paid it when due, and seven days after sent it as their voucher to the drawee, who apprised them that the acceptance was forged: and it was held by Gibbs, C. J., Heath, J., and Dallas, J. (Chambre, J., dissenting), that the plaintiffs could not recover from the defendants the amount which they had thus paid them on the

(a) See Smith v. Marsack, 6 C. B. 486 (E. C. L. R. vol. 60).

forged acceptance. At all events, the bankers could not recover back the money from the clerk, who received it on account of his employers: Stephens *v.* Badcock, 3 B. & Ad. 354 (E. C. L. R. vol. 23). A fortiori they could not justify taking the money from him by force. [WILLIAMS, J.—The whole question is, whether the delivery of the money was complete or not.] Of that, it is submitted, there can be no doubt.

Bovill, Q. C., *Manisty*, Q. C., and *T. Jones*, in support of the rule.—To constitute a complete payment so as to pass the property in the money, there must be the concurrence of the two minds,—the payer must intend to pay, and the recipient must assent to receive the money. The transaction here had not reached that stage when the money was recalled; for, the plaintiff had not finished the counting to his satisfaction. Could it be said, that if there had been a 5*l.* note short, or a counterfeit note amongst the mass, he could not have demanded an additional note or repudiated the bad one? Without complete acceptance, the payment was inchoate, and might be recalled. At all events, it is manifest that this was a payment made under a mistake of facts, and therefore it is inequitable on the part of the recipient to retain it, and it might be recovered back upon the principle laid down in Kelly *v.* Solari, 9 M. & W. 54,† Townsend *v.* Crowdie, 8 C. B. N. S. 477 (E. C. L. R. vol. 98), and the other authorities collected in the notes to Marriot *v.* Hampton, 2 Smith's Leading Cases 356. [KEATING, J.—There was no laches in those *cases: here there was.] Suppose there were laches, in order [*129 to preclude the party from recovering back the money, it must be shown that he has sustained prejudice; and none was sustained here. Thus, in Wilkinson *v.* Johnston, 3 B. & C. 428 (E. C. L. R. vol. 10), 5 D. & R. 403 (E. C. L. R. vol. 16), certain bills of exchange purporting to have, amongst others, the endorsement of H. & Co., bankers of Manchester, were presented for payment in London at a house where the acceptance appointed them to be paid. Payment being refused, the notary who presented them took them to the plaintiff, the London correspondent of H. & Co., and asked him to take up the bills for their honour. He did so, and struck out the endorsements subsequent to that of H. & Co., and the money was paid over to the defendants, the holders of the bills. The same morning, it was discovered that the bills were not genuine, and that the names of the drawer, the acceptor, and H. & Co. were forgeries. The plaintiff immediately sent notice to the defendant, and demanded to have the money repaid. This notice was given in time for the post, so that notice of the dishonour could be sent the same day to the endorsers. It was held, that the plaintiff, having paid the money through a mistake, was entitled to recover it back, the mistake having been discovered before the defendant had lost his remedy against the prior endorsers. What is this but a payment of money by mistake, *in the hurry of business*, which the Court of Queen's Bench, in Lucas *v.* Warswick, 1 M. & Rob. 293, held might be recovered back as money had and received to the use of the plaintiffs? In Martin *v.* Morgan, 3 J. B. Moore 635 (E. C. L. R. vol. 4), 1 B. & B. 289 (E. C. L. R. vol. 5), Gow 122, where the defendants, knowing a check to be post-dated, and that the drawers were insolvent, presented it for payment to the plaintiffs, who were

bankers, and who, without knowledge of these facts, paid it, although
*130] they had *no funds of the drawers in their hands at the time, but expected some in a few days,—it was held that they were entitled to recover it back as money had and received to their use. [BYLES, J.—That was a case of fraud.] In Cocks *v.* Masterman, 9 B. & C. 902 (E. C. L. R. vol. 17), 4 M. & R. 676, a bill purporting to have been accepted by A., was presented for payment to his bankers on the day when it became due. The latter, believing it to be the genuine acceptance of A., paid the amount, but, *on the following day*, having discovered that the acceptance was a forgery, they gave a notice of that fact to the party to whom they had paid the bill, and required him to return the money. But the Court decided that the holder of a bill is entitled to know, on the day when it becomes due, whether it is honoured or dishonoured; and that, *no notice of the forgery having been given on the day the bill became due*, the parties who had paid the money were not entitled to recover it back. There, but for their laches, and the prejudice sustained by the defendants, the plaintiffs would have been held entitled to recover back the amount as having been paid under a mistake of facts. [BYLES, J.—I do not remember any case where it has been held that the payment of a check can be recalled by reason of the banker subsequently discovering that the customer's account was overdrawn. ERLE, C. J.—The nearest case is that of Boyd *v.* Emmerson, 2 Ad. & E. 184 (E. C. L. R. vol. 29), 4 N. & M. 99 (E. C. L. R. vol. 30). The plaintiff receiving a check drawn upon the defendants, who were his own bankers, took the check to the banking-house, where he first gave some directions to a clerk upon another subject, and then, while the clerk was minuting such directions, laid the check on the counter and said "Place this to my account" or "credit." Nothing more was said on either side, and the plaintiff left the check. It was not cancelled, or placed to the plain-
*131] tiff's credit, or debited to the *drawer, who had already overdrawn his account; and the bankers, after making some inquiries after the drawer, which led to no result, gave the plaintiff notice on the following day that the check would not be paid. It was held, that, in the absence of an express direction or demand by the plaintiff at the time of presenting the check, the bankers were entitled to consider it presented to them, not as the agents of the drawer for the purpose of present payment, but as the plaintiff's agents, to place the check to his credit, like any other negotiable security, and obtain payment with reasonable diligence; and, consequently, that no implied promise to pay arose from the check being received without observation, and no further communication made to the plaintiff till the following day.] Suppose a check paid by the banker under an impression that it was drawn by one customer, and it turned out that it was drawn by another,—could the person who had received the money lawfully retain it? [BYLES, J.—That is not this case. Can you justify taking the money out of the man's pocket? Suppose the plaintiff had gone away with the money and given it to his employer, could you have taken it from the pocket of the latter?] Why not? In Smith *v.* Mundy, 29 Law J., Q. B. 172, the plaintiff agreed to enter into partnership with one Williams, who owed money to the defendant. The plaintiff, with the sanction and authority of Williams, wrote

to the defendant, enclosing the halves of two bank-notes, and asking for a statement of the full amount due from Williams. The defendant wrote, acknowledging the receipt of the half-notes, and stating that, on receipt of the second halves, he would send a stamped acknowledgment. The agreement for the partnership between the plaintiff and Williams went off, and the plaintiff required the defendant to return the half-notes; *and, on his refusal to do so, brought an [*132 action for their recovery: and it was held that he was entitled to recover. That is a much stronger case than this.

ERLE, C. J.—I am of opinion that this rule should be discharged. This is an action for a trespass committed by the defendants, in assaulting and imprisoning the plaintiff under a plea that certain money which was in the pocket of the plaintiff was the property of the defendants, and that the latter had a right to detain him and take it from him. The question reserved for our consideration,—and upon which we are called upon to decide both as Judge and jury,—is, whether, under the circumstances proved at the trial, the money had passed to the plaintiff or still remained the property of the defendants. The ordinary rule of law, is, that the property in a chattel passes according to the intention of the parties. In an ordinary transaction of sale, where the proposed seller says to the proposed buyer, "I will sell you such and such goods at such a price," the assent of the buyer signified by the word "done" is enough to fix the right of property. In the case of a gift, the property passes by delivery. And so with all the ordinary transactions of life. With regard to checks, the well-known course of business is this,—When a check is presented at the counter of a banker, the banker has authority on the part of his customer to pay the amount therein specified on his account. The money in the banker's hands is his own money. On presentment of the check, it is for the banker to consider whether the state of the account between him and his customer will justify him in passing the property in the money to the holder of the check. In this case, the banker's clerk had gone through that process, and so far as in him lay did that which would pass the property in the money to the plaintiff. He *counted out the notes and gold and placed them on the counter [*133 for the plaintiff to take up. It no longer remained a matter of choice or discretion with him whether he would pay the check or not. The plaintiff had taken possession of the money, counted it once, and was in the act of counting it again, when the clerk, who had gone from the counter, finding that there was a mistake, not as between him and the bearer of the check, but as between him and the customer, returned and claimed to revoke the act of payment which on his part was already complete, and claimed to have the money back. Now, the bankers had parted with the money, and the plaintiff had accepted it. It is true he had not finished counting it, and that, if he had found a note too much or a note short, there was still time to rectify the mistake. But, according to the intention of the parties, and the course of business, the money had ceased to be the money of the bankers, and had become that of the party presenting the check. It was the clear opinion of the jury that the property passed: and equally clear am I, if it was a question of law for me, that the bankers did by that which took place pass the property in the money to the holder of the

check. On that ground I am of opinion that the plaintiff is entitled to retain his verdict. That which passed amounted to payment of the check; and the plaintiff was entitled to retain the money. Some of the cases which were cited might be applicable, if the customer had obtained by mistake from the banker money to which he was not entitled. In Kelly *v.* Solari, 9 M. & W. 54,† the administratrix was not entitled to receive the money. The policy under which the payment had been made to her was a lapsed policy, and the money was paid under a mistake of fact. That being so, and it being against all
*134] equity and good conscience that she should retain it, *the money was held to be recoverable back. But, as between the parties here, there was no manner of mistake. The bankers' clerk chose to pay the check; and the moment the person presenting the check put his hand upon the money it became irrevocably his.

WILLIAMS, J.—I am entirely of the same opinion. Drawing the inference which is fairly deducible from the facts proved, it seems to me that the person who acted as cashier of the bank upon the occasion in question meant to part with the money, and that the person who presented the check meant to receive it and did receive it. There was a complete and absolute transfer of the money under the authority of the drawer of the check. It is said that the transaction was not complete, because the plaintiff had not finished counting the money, and therefore that he did not consider that the matter had come to an end. I cannot by any means assent to that. The recipient had a right to count the money, or he might if he pleased have taken it off the counter without counting it. I see no ground whatever for saying that the transaction was incomplete. There was no evidence that anything further remained to be done to complete it. The act of counting was no indication on the part of the plaintiff that he had not accepted the money. That argument was founded upon a mistaken view of the mode in which the question arises. Where money is paid, not in performance of a promise, at the precise day on which it ought to have been paid, but in satisfaction of a breach of promise, there must be not only payment but acceptance in satisfaction. That, however, is not so where the payment is made in performance of an agreement on the precise day, or where the creation of the right to receive
*135] the money and the act of payment are simultaneous. In *these cases, where the money finds its way into the hands of the person to whom the payment is to be made, the transaction is complete. If, in this case, after the money had been placed by the cashier upon the counter, and drawn towards him by the plaintiff, a thief had come in and stolen it whilst he was in the act of counting it, the loss would clearly have fallen upon the plaintiff, and the bankers would not have been under any obligation to pay the amount over again. Then it is said, that, the money having been paid under a mistake of fact, money had and received would lie to recover it back, and therefore that the defendants were justified in seizing the plaintiff and forcibly regaining possession of it. It is quite unnecessary to consider that. There was no mistake of fact within the meaning of the rule on the subject. One acting as the cashier of the bank, with the authority of the bankers, transfers the possession of the money to the plaintiff under an impression that he is the bearer of a genuine check, and

takes the check from him in the ordinary way. All the facts are precisely as the cashier apprehended them. There is no mistake. It may be, that, if the cashier had at the time been aware of the state of the customer's account, he would not have paid the check. But, if we were to go into all the remote considerations by which parties may be influenced, it would be opening a very wide field of conjecture, and would lead to infinite confusion and annoyance.

BYLES, J.—I am of the same opinion. The property in the money passed to the recipient, and the check was paid. It is true that the money remained upon the bankers' counter. But a banker's counter is no more than a table which is provided by the banker for the more convenient carrying on cash transactions *between him and his [*136
customers and those who come to pay and receive money there: and the same rule must be applied whether the payment is made from one side of the counter or the other. Here, the check was received by the cashier, and the money handed over to the person presenting it. The latter had counted the money once, and was in the act of counting it again when the cashier claimed a right to recall it. I must confess that I should be inclined to hold, as matter of law, that, so soon as the money was laid upon the counter for the holder of the check to take, it became the money of the latter. It has been suggested that it was still competent to the party to object to one of the notes, for instance, that it was forged. What then? The only consequence would be that he would have a right to demand another note in place of it. His right to rescind the transaction so far would not prevent the property in the rest from vesting in him. The only point upon which I have felt any hesitation, is, whether there could be any retractation of the payment. I think, however, it would be extremely dangerous, and would create a great sensation in the city of London, if it were to be held in Westminster Hall, that, after a check had been regularly handed over the banker's counter and the money received for it, and in the act of being counted, the banker might treat the check as unpaid, because he has subsequently to his taking the check and handing over the amount ascertained that the state of the customer's account was unfavourable. If it were so held, it certainly would be so for the first time. This was not a payment made under any mistake of facts. The bankers (or their agent, the cashier) had full notice in writing of all the facts. And, even if this had been a payment made under such a mistake of facts as would have entitled the bankers to recover back the money *from the holder of the [*137
check, by an action for money had and received, I must entirely withhold my assent from the proposition that they could justify the act of seizing the person to whom they had voluntarily paid the money, and picking his pocket. I am quite aware that a question has lately arisen, as to whether or not a party (or his servants) whose property is wrongfully in another's possession may by retaking it administer summary redress to himself.(a) But, be that as it may,

(a) Blades v. Higgs, 10 C. B. N. S. 713 (E. C. L. R. vol. 100), and 12 C. B. N. S. 501 (E. C. L. R. vol. 104). The question there was whether the things seized (rabbits) *were* the *property* of the master. This Court upon the first occasion decided, that, assuming that they were, the seizure was justifiable. On the second occasion, they held that the rabbits were under the circumstances the subject of property. The propriety of the first decision was not questioned: and the decision of the Court upon the second occasion has since been affirmed on appeal: vide post.

when the subject-matter in question is money, the possession and the property in which are inseparable, I entertain no doubt whatever that he could do nothing of the sort. For these reasons, it appears to me that there has been no failure of justice here, and that the plaintiff is entitled to retain his verdict.

KEATING, J.—I also am of opinion, upon the facts proved in this case, that the verdict should stand. I cannot for a moment doubt that the delivery of the money by the cashier to the holder of the check was complete, and that the property in it vested in the latter. The cashier counted out the money, and placed it on the counter for the purpose and with the clear intention of putting it under the control of the person who presented the check. This was no conditional payment,—as if the cashier had said to the party, "I hand you this money in payment of the check, on condition of your counting it, *138] and assenting to its *correctness." Suppose the plaintiff had been content to take up the money without stopping to count it,—could anybody doubt that the property would have passed? It does not the less pass because the recipient chooses to count it before he puts it into his pocket. If, then, the property passed, the other question does not arise. No case has ever yet held that a party has a right to retake by force property which has already passed and vested in another. Mr. *Manisty* has suggested, that, even if the property passed by the act of payment, it only passed in a qualified and limited manner, leaving the banker at liberty to revoke the payment on discovering that the customer had not sufficient effects in his hands. I cannot assent to that proposition. Having once parted with the money animo solvendi, it was out of his power to recall it. The plaintiff is clearly entitled to retain his verdict.

Rule discharged.

A custom to pay over drafts of solvent dealers with banks would be a bad custom, and if proved would not render the drawer of a check liable if paid by the bank at a time when he had no funds to meet it, and after he had paid the payee the money called for by it: The Lancaster Bank *v.* Woodward, 8 Harris (Pa.) 357. But a bank, if induced to certify a check through the fraudulent misrepresentation of the drawer of it, may reclaim it or countermand its payment if not negotiated: Bank *v.* Baxter, 31 Vt. 101.

GORE *v.* SIR GEORGE GREY, Bart., and Others. *Nov.* 24.

The 14th section of the Queen's Prison Act, 5 Vict. c. 22, is not affected by the 102d section of the Insolvent Debtors' Act, 1 & 2 Vict. c. 110, or repealed by the 16 & 17 Vict. c. 96, s. 35.

THIS was an action for an alleged assault and false imprisonment.

The first count of the declaration stated that the plaintiff, being on the 9th of February, 1856, a prisoner in the custody of the defendant John Hudson, the keeper of the Queen's Prison, under a commitment in execution for costs in a certain action in Her Majesty's Court of Queen's Bench at Westminster pending between the plaintiff as plain-

tiff and one John Baker the defendant therein, and not for any criminal or other matter or cause than as aforesaid, and being as such prisoner entitled to the benefit of the several Acts *of Parliament then in force for the relief of insolvent debtors, the [*139 defendants, nevertheless, maliciously intending and contriving to deprive the plaintiff of the benefit of the said Acts of Parliament, and to detain him longer in custody, and to prevent him from petitioning the Court for relief of insolvent debtors under the same Acts of Parliament or any of them for his discharge out of custody, assaulted the plaintiff, and seized and laid hold of him, and forced and compelled him to enter a certain vehicle, and by that means carried and removed him as a prisoner and in custody, against his consent, and without any necessity, from and out of the said Queen's Prison to another and different prison and place of confinement, to wit, Bethlehem Hospital, to which last-mentioned place and the prisoners and persons confined therein the said several Acts of Parliament, or any of them, do not apply, or the jurisdiction of the last-mentioned Court extend; and there then, by force, and against his consent, imprisoned and detained the plaintiff, and disqualified and prevented him from obtaining his discharge as an insolvent debtor, or otherwise, and from taking the benefit of the said Acts of Parliament or any of them, and from petitioning the said Court for relief of insolvent debtors, or applying to any other Court for his discharge, for the space of two years and eighty-five days, contrary to law.

The second count stated, that, during the time aforesaid, the plaintiff, desiring to petition the honourable the Commons House of Parliament stating and complaining of such his detention and deprivation of the benefit of the law, and having drawn up and written divers petitions for that purpose, and also divers other papers, letters, and writings for the purpose of sending to his friends or any other persons who might assist or protect him, and also having written a diary of *occurrences affecting and relating to himself and his treatment in the said hospital, in order to adduce the same as evi- [*140 dence on his behalf in any legal or parliamentary investigation thereof, and having also other letters in his possession, the defendants, intending and contriving to prevent such petitioning or communication, or such evidence being adduced, again assaulted the plaintiff, and took and destroyed or kept and keep from the plaintiff several such petitions, letters, writings, and parts of the said diary, which were then at the time of such assaults secreted upon his person; and the plaintiff said that his writing of the same was necessarily in secret, and done as if contrary to law, by reason that he was watched and prevented by the defendants, their officers, agents, and servants, from openly writing the same.

The third count stated that the defendants during the time aforesaid assaulted the plaintiff on divers occasions, and forced and compelled him to strip naked and get into a bath, while they took and examined his clothes in another apartment, and abstracted all his papers and writings in the pockets thereof or concealed therein: and the plaintiff said that such stripping and bathing was on false pretences of his health, or without any cause alleged, and in fact without any just

cause, but arbitrarily, and as a means and mode of seizing and depriving him of his said papers and writings.

The fourth count stated, that the defendants, on divers and numerous occasions, forced and compelled the plaintiff against his consent to go and be in a yard in the open air in severe cold weather, for a long space of time, to wit, two hours, and also then forced and compelled him to walk about or to be pulled and dragged about in the said yard, on the false pretence of his health, although well knowing
*141] the same to be *prejudicial to his health and dangerous to his reason and life.

The fifth count stated that the defendants during all the time aforesaid refused to permit nor would they suffer the plaintiff to speak with or see his wife and children or any of them, except for a short time twice in each month at the most, and from the 15th of June, 1857, to the 8th of March, 1858, and being for the space of thirty-eight successive weeks, only permitted him to see his said wife twice, and wholly refused and prevented any visit from his said children: that he the plaintiff always protested against the legality of such imprisonment in the said hospital; and that the grievances aforesaid in the fourth and fifth counts mentioned were committed with the wrongful and malicious intent and as a means of inducing the plaintiff to waive his protest against such detention, and to admit that there had been some little cause or foundation for his having been so sent as in the first count mentioned to the said hospital: And that, by means of the said imprisonment, assaults, trespasses, and cruelties, the plaintiff was not only as aforesaid disqualified, disabled, prevented, and delayed during all the time aforesaid from taking the benefit of any of the said Acts of Parliament, and from petitioning the said Court for the relief of insolvent debtors for his discharge, as well as from exercising his right of petitioning the said Commons House of Parliament, but was then so imprisoned along with insane persons, whereby his credit, reputation, and character were and still are greatly injured and contaminated; and he was at the same time deprived of the society of his said wife and children, and they (the said children being three young daughters) were thereby deprived, and suffered great hardships
*142] and injury for want of his protection, labour, and support; *and the plaintiff had been and was deprived of the possession and use of his said petitions, diary, letters, and papers so seized, and he was greatly hurt and wounded in his feelings and mind, and his general health was and is greatly and permanently injured, and his time had been greatly wasted, and he was and is prevented from earning his livelihood and from attending to and perfecting divers inventions of a mechanical nature, and which might and otherwise would have been perfected and of great value; and he had been compelled to incur divers expenses in and about obtaining his discharge and vindicating his character from the said imprisonment and the consequences thereof, to a large amount, to wit, 100*l.*, and was otherwise injured, &c.

The defendants Sir George Grey, John Hudson, John Crouchley Evison, Charles Colwell, John Wilcocks Wakem, and Samuel Griffiths pleaded,—first, not guilty,—secondly, to the first count of the declaration, that, before and at the time of the removal of the plaintiff from

and out of the Queen's Prison as in the said first count mentioned, the defendant Sir George Grey was one of Her Majesty's principal secretaries of state, and the defendant Hudson was the keeper of the Queen's Prison, and the defendant Evison was the deputy keeper of the said prison, and the defendant Colwell was a turnkey of and in the said prison, and the defendant Wakem was the surgeon of the said prison, and the defendant Griffiths was one of the physicians of St. Thomas's Hospital: that, on the 26th of January, 1856, the plaintiff, being then such prisoner as in the said first count mentioned, became of unsound mind; whereupon the defendant Hudson, so then being such keeper of the Queen's Prison as aforesaid, on the day and year aforesaid, duly and in pursuance of the statute in that case made and *provided, reported to the defendant Sir George Grey, Bart., so then [*143 being such secretary of state as aforesaid, that the plaintiff had become and was of unsound mind: that, on the day and year aforesaid, the defendants Wakem and Griffiths, so then being such surgeon and physician as aforesaid, duly, and in pursuance of the said statute, certified under their hands to the said defendant Sir George Grey, Bart., so being such secretary of state as aforesaid, that the plaintiff then was of unsound mind; whereupon the said defendant Sir George Grey, Bart., so then being such secretary of state as aforesaid, afterwards, to wit, on the 4th of February, 1856, by his warrant and order under his hand, bearing date the day and year last aforesaid, and directed to the keeper of the Queen's Prison, and to all others whom it might concern, duly, and in pursuance of the said statute, did authorize and direct them to cause the plaintiff to be removed from the said Queen's Prison, to the Royal Hospital of Bethlehem, there to remain until further order should be made therein; that afterwards, to wit, on the 9th of February, in the year last aforesaid, the defendants Hudson, Evison, and Colwell, so then being such keeper, deputy keeper, and turnkey as aforesaid, in obedience to the said warrant and order, and in pursuance of the said statute, did remove and cause to be removed the plaintiff from and out of the said Queen's Prison to the said Royal Hospital of Bethlehem, and the president, treasurer, and governors of the said Royal Hospital of Bethlehem, in pursuance of the said statute, did then receive the plaintiff, him safely to keep according to the provisions of the said statute in that behalf,—which were the same several trespasses whereof the plaintiff had in the said first count complained against the defendants Sir George Grey, Bart., John Hudson, John Crouchley Evison, Charles Colwell, *John Wilcocks [*144 Wakem, and Samuel Griffiths. Issue thereon.

The defendants William Charles Hood and William Helps pleaded,—first, not guilty,—secondly, to the second and subsequent counts, a justification as physician and apothecary respectively of Bethlehem Hospital, acting under and in pursuance of the warrant of the secretary of state, and alleging that all the matters and things in the second and subsequent counts complained of by the plaintiff were done and committed in pursuance of and in obedience to, and were in all respects authorized by and conformable to, certain rules and orders theretofore duly made for the government, care, and management of the said hospital and of the persons confined therein, and for prescribing and regulating the duties of the several officers and servants therein, and

approved by one of Her Majesty's principal secretaries of state for the time being, in pursuance of the statute in such case made and provided, on the 14th of September, 1854, and which said rules and orders at and during all the several times in the second and subsequent counts of the declaration mentioned were in full force and effect, and not in any manner revoked, annulled, or made void. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after the last term, when a verdict was found for the defendants, the jury being of opinion that the justification was made out.

The plaintiff, in person, on a former day in this term, moved for a rule nisi for a new trial, on the grounds of misdirection, non-direction, improper rejection of evidence, and that the verdict was against the weight of evidence; and also for judgment non obstante veredicto on
*145] the second plea of each set of *defendants. The arguments relied on by the plaintiff are sufficiently stated in the judgment of the Court. *Cur. adv. vult.*

WILLIAMS, J., now delivered the judgment of the Court:—

In this case an application was made early in this term, by the plaintiff in person, for a new trial, or for judgment notwithstanding the verdict.

The action was for false imprisonment, in respect of having in the year 1856 removed the plaintiff, then being a prisoner for debt in the Queen's Prison, to Bethlehem Hospital, and receiving and confining him there as a lunatic. The defendants pleaded,—first, not guilty,—secondly, a justification under the statute 5 Vict. c. 22 (called the Queen's Prison Act).

The grounds of application for a new trial are, for non-direction and misdirection and the improper rejection of evidence; and also for that the verdict was against the weight of evidence. The alleged improper rejection of evidence consisted in the Lord Chief Justice refusing to allow the plaintiff to put a question to one of the witnesses as to what his own opinion of his duty was. This was plainly only a question of law, which might be commented on by the Judge, but could not properly be made the subject of inquiry from the witness, and was therefore properly excluded.

Several minor points were made by the plaintiff in the course of his address to us, as to the formal proofs of the plea, which we find, on consulting the notes of the Lord Chief Justice, have no foundation in fact or in law. The great contention, however, in support of the application for a new trial, was, that, upon the issue as to the plaintiff's insanity, the verdict was against the weight of evidence. But,
*146] after consulting *the notes of my Lord, we agree with him in thinking that there is no sufficient reason for disturbing the verdict in this respect.

The misdirection and non-direction complained of consisted in telling the jury to consider only whether the defendants had duly pursued the course prescribed by the Queen's Prison Act, without regard either to the previous Insolvent Debtors Act, 1 & 2 Vict. c. 110, or the statutes respecting the care and treatment of lunatics passed subsequently to the Queen's Prison's Act, viz., the statute 8 & 9 Vict. c. 100, and the statute 16 & 17 Vict. c. 96.

It is obvious that the only questions which the jury had to try were, the issues joined on the pleas of not guilty and the justification under the Queen's Prison Act: and the Chief Justice had no other duty than to direct the jury properly in respect of those two issues. It is plain, therefore, that the plaintiff's argument as to the Queen's Prison Act having been repealed or qualified by any later or prior Act, is in truth only an argument that the plea of justification, as pleaded, is no sufficient answer to this complaint; or, in other words, that the plaintiff is entitled to judgment notwithstanding that plea were proved to the satisfaction of the jury: that is to say, in technical language, that he is entitled to judgment non obstante veredicto.

The question thus raised is certainly a very important one; and we have therefore thought it right to take time for examining and consulting the several statutes; and, having done so, we have arrived at the conclusion that the Queen's Prison Act, 5 Vict. c. 22, stood still in force, unrepealed and unaltered by any subsequent statute, and unqualified by the previous statute of the 1 & 2 Vict. c. 110.

The 102d section of the last-mentioned statute (the Insolvent Debtors Act) certainly prescribes, generally, with respect to prisoners for debt in any prison, who *shall become of unsound mind, an essentially different course from that subsequently provided by [*147 the 14th section of the statute 5 Vict. c. 22, with respect to the removal, under the secretary of state's warrant, of insane prisoners in the Queen's Prison to Bethlehem Hospital. But, as the latter enactment is general in its terms, which apply not merely to criminal prisoners, but to "*any prisoner* confined in the Queen's Prison," it is manifestly inconsistent with the previous enactment in the 14th section of the statute 1 & 2 Vict. c. 110, and therefore virtually repeals that section as to prisoners for debt confined in the Queen's Prison.

With regard to the subsequent statutes,—the 45th section of the statute 8 & 9 Vict. c. 100 enacts generally that no person, not being a pauper, shall be received into or detained as a lunatic in any hospital without such an order and certificate having been procured as is described in the Act. But by s. 116 it is enacted that this statute shall not extend to Bethlehem Hospital.

This section, however, is repealed by the 35th section of the 16 & 17 Vict. c. 96, and thenceforward Bethlehem Hospital is by the latter enactment subjected to the provisions of the 8 & 9 Vict. c. 100, and of the statute 16 & 17 Vict. itself.

By the latter statute, the 45th section of the statute 8 & 9 Vict., to which we have just adverted, is repealed; and in lieu thereof is substituted the enactment contained in the 4th section of the statute 16 & 17 Vict. c. 96, viz., that no person, not being a pauper, *and save where otherwise provided or authorized under this or any other Act,* shall be received as a lunatic into any licensed house or hospital, without such an order and medical certificate having been procured as are required by that enactment. It is not pleaded or suggested that such an order and certificate were *procured on the occasion of the plaintiff's [*148 being removed from the Queen's Prison to Bethlehem Hospital.

But it must be observed that this enactment expressly excepts cases where there is a provision or authority to receive a lunatic into any

hospital under any other Act. It excepts, therefore, the case before us, inasmuch as there was at the time of the passing of the statute a provision and authority under the 14th section of the Queen's Prison Act, 5 Vict. c. 22, to remove to Bethlehem Hospital under the warrant of the secretary of state any prisoner confined in that prison who shall be found to be of unsound mind.

Hence it follows, that, although the 102d section of the Insolvent Act is virtually repealed by the 14th section of the Queen's Prison Act, because the former enactment is utterly inconsistent with the latter, yet the 14th section of the Queen's Prison Act on which the defendants have founded their plea of justification is not repealed or affected by the 4th section of the statute 16 & 17 Vict. c. 96, by reason of the saving clause which is inserted into it.

We have come, therefore, to the conclusion that the plea of justification in this case was well pleaded. And it was sustained by the evidence at the trial to the satisfaction of the jury and the Judge: and accordingly we think that no reason has been or can be shown why we should grant the plaintiff's application, either for a new trial or for judgment notwithstanding the verdict.

We may add that the Lord Chief Justice is of opinion that the plaintiff is entitled to a verdict on the issue joined on the plea of not guilty. The main objection, of course, is upon the record.

Rule refused.(a)

(a) See the 25 & 26 Vict. c. 104.

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*149] *RUSSELL v. VISCOUNT SA DA BANDEIRA.

Nov. 22.

The plaintiff contracted with the defendant to build for the Portuguese government a steam-vessel of war for 10,400*l.*, such price or sum to be inclusive of all charges of every description except as thereinafter mentioned: such vessel to be built in a good, substantial, and workmanlike manner, and with good sound materials of all kinds as prescribed by Table A. of Lloyd's registry for ships of the class A. 1, 13 years, and to the satisfaction of Admiral S.; and to be delivered at Millwall on or before the 25th of April, 1859, ready for sea, "finished, fitted, found, and equipped in manner similar in all respects to that which is practised with ships or vessels of the same class in Her Majesty's navy under contracts with the Admiralty, except machinery (which was being manufactured by the plaintiff under another contract), armament, furniture, stores, plate, linen, glass, crockery, and opticians' instruments." And it was thereby agreed "that the said purchase-money or sum of 10,400*l.* is inclusive of all charges for the said ship or vessel finished and fitted perfectly in every respect; and no charges shall be demanded for extras; but any addition or additions which may be made *by order in writing* of the said Admiral S. as an extra or extras shall be paid for at a price to be previously agreed upon in writing." Penalty, 5*l.* for each day the vessel should not be delivered finished, fitted, and completed after the day named: provided that, if the vessel should not be launched and delivered at the time appointed, by reason of any cause not under the control of the plaintiff, the same to be proved to the satisfaction of Admiral S., and to be certified by him in writing, then the said penalty should not be enforced for such number of days or for such a time as the said Admiral S. should in such certificate name.

In the course of the construction of the vessel, extras and additions to the work to a large aggregate amount were done under the directions (*not in writing*) of certain officers or servants of the Portuguese government:—Held, that the plaintiff was not entitled to recover the price of these.

The plaintiff further claimed the price of certain articles supplied by him when the vessel was nearly completed (at the request of the defendant's solicitor, and expressly without preju-

dice to his right to be paid for them if not within the contract), which Admiral S. claimed to be entitled to under the contract, as being necessary to the complete equipment of a vessel of war of her class built under contracts with the Admiralty; but which the arbitrator who settled the case found were not usually furnished under contracts made by the Admiralty with private builders, but were only supplied from the government stores to vessels when going out on active service,—such as spare masts and yards, duplicate sails, &c.:—Held, that, these articles not being within the contract, the plaintiff was entitled to be paid for them as upon a quantum meruit.

The vessel not having been completed by the day stipulated for its delivery, the defendant claimed to set off a large sum in respect of the penalty of 5*l.* per day provided for by the contract, but the arbitrator found that a considerable portion of the delay in the completion of the vessel was attributable to the disputes and objections on the part of the defendant which, upon the construction put upon the contract by the Court, were untenable:—Held, that the plaintiff was not liable for the penalties.

THIS action was brought for the recovery of a sum of money claimed as the price and value of certain work done, and materials, stores, and other things provided, under the circumstances hereinafter stated, for a screw steamship of war called The Donna Maria Anna.

The declaration contained the common counts for goods sold and delivered, for work done and materials *provided, for money [*150
paid, and for money found to be due on accounts stated.

The defendant pleaded,—first, never indebted,—secondly, payment before action,—thirdly, a set-off for liquidated damages payable by the plaintiff to the defendant under certain articles of agreement, dated the 16th of November, 1858, and for money paid, had, and received, interest, and money due upon accounts stated; upon which pleas issue was joined.

The following are the particulars of the set-off:—

"To liquidated damages due and payable by the plaintiff to the defendant under an agreement dated the 16th day of November, 1858, for default in not delivering the ship therein mentioned, finished, fitted, found, equipped, and completed for 200 days after the 25th day of April, 1859, at 5*l.* per day	1000	0	0
"To amount paid for wages to officers and crew of the said ship, being an outlay occasioned by the plaintiff's default above mentioned .	255	14	0
"To amount paid for wages to officers and crew of the said ship, being an outlay occasioned by the plaintiff's said default	120	0	0
"To amount paid William Fairweather and John Miller, 1st and 2d engineers of the said ship, for one month's wages and rations, being an outlay occasioned by the plaintiff's said default	43	0	0
	£1418	14	0

The cause came on to be tried before Wightman, J., at the Surrey Spring Assizes, 1860, when, without the production of any evidence, a verdict was by consent found for the plaintiff for the damages claimed in the declaration, leave being reserved to the defendant, upon certain conditions agreed between the parties, to move to enter a verdict for him. Subsequently, by consent, and on reading a rule of the 20th April, 1860, obtained in pursuance of the said leave to move, it *was by another rule of Court ordered, among other [*151
things, that a special case should be stated for the opinion of this Court, to be settled, in case the parties differed, by a barrister, who was to have all usual powers for that purpose, all questions of amount or price being reserved until after the judgment should be given upon the case; and that, upon the judgment being given, the question of amount or price should be referred, if necessary, to the

said arbitrator, to ascertain the same and certify the amount thereof, and to direct by and to whom the costs of and occasioned by the said reference should be paid, and that the said verdict should stand, or be set aside or reduced, or a verdict entered for the defendant, in accordance with the decision of the Court upon the special case and the certificate of the said arbitrator, who was to have all the powers of a Judge at Nisi Prius.

The said arbitrator, in pursuance of the order, stated the following case:—

1. The plaintiff is a civil engineer and ship builder carrying on business at Millwall, and his offices are in Great George Street, Westminster.

2. The defendant is a Portuguese nobleman residing in Portugal. He was formerly minister of marine in the Portuguese government; and, in that capacity, on the 16th of November, 1858, he entered into a contract under seal with the plaintiff, hereinafter set forth, to build, in the manner and on the terms in such contract stipulated, a screw steamship of war called the Donna Maria Anna, and he is now sued in this action as representing the Portuguese government under the arrangement for that purpose contained in the agreement of the 12th November, 1859, hereinafter set forth.

3. The action was brought to recover the sum of 3318*l.* 15*s.* 9*d.*, the aggregate amount of three several accounts appended to the case, and
*152] marked respectively *A., B., and C., which amount is claimed by the plaintiff in respect of the work, stores, spare gear, duplicates, and other matters described in such accounts, executed upon and supplied to the said ship Donna Maria Anna, which the plaintiff contends he was not bound to execute or supply under or in pursuance of the terms of the said contract of the 16th of November, 1858, and the value of which he claims to be paid in addition to the price of the said ship mentioned in the said contract, and contends that he is entitled to recover in this action under some contract appearing by or to be implied from the facts and circumstances herein stated.

4. The defendant, on the other hand, contends that the plaintiff was under and by the terms of the said contract of the 16th of November, 1858, bound to execute and supply the work, materials, and matters mentioned and described in the said accounts A., B., and C., or, if not, that the Portuguese government have not under the circumstances either expressly or impliedly contracted to pay for the same; and that the plaintiff is not in any way entitled to recover the value thereof in this action.

5. The said accounts are in the particulars of the plaintiff's demand shortly referred to and described as follows:—

"1st, Alterations, &c.	£1026	5	9
"2d, Alterations or additional work . .	242	7	0
"3d, Stores, spare gear, duplicates, &c. . .	2050	3	0
	£3318	15	9"

6. Since the delivery of the particulars, it has been ascertained that the sum of 45*l.* 3*s.* 2*d.* included in the above sum of 2050*l.* 3*s.*, was charged in error, having been already paid on the contract price

for the engines, which reduces the total amount for which the action is now maintained to 3273*l.* 12*s.* 7*d.*

*7. The first communication which the plaintiff received upon the subject of the said vessel was by a letter written by Admiral Sartorius (who is an admiral in the Royal Navy, and Vice-Admiral in the service of the King of Portugal), as the agent of the Portuguese government, of which letter the following is a copy:— [*153

"Lisbon, 8th April, 1858.

"Sir,—I am authorized by His Excellency the minister of marine to offer to you the building of a vessel of 300 tons burthen, with a screw and a machine of 60 horse-power. You are at liberty to adopt your own lines and rig for obtaining as great speed as possible. You are also at liberty to procure the engines, subject to the conditions as detailed in the contracts made with Messrs. Green, Messrs. Bolton & Watt, and Messrs. Humphreys. Mr. Theobald, my solicitor, will give you every necessary information on these points, as well as regarding the various payments, and the manner of the same.

"G. R. SARTORIUS."

8. Mr. Theobald, who is referred to in this letter, was then acting and still continues to act as the solicitor of the minister of marine of the kingdom of Portugal, and has been and is engaged in various matters for the Portuguese government; and he is the attorney for the defendant in the present action.

9. Upon receiving this letter, the plaintiff at once communicated with Mr. Theobald, and subsequently inspected at his office various contracts which had been made with other English ship-builders; and upon the return of Sir G. R. Sartorius to this country, the said Sir G. R. Sartorius and Mr. Theobald had by appointment a meeting with the plaintiff at his office in Great George Street on the 19th of May, 1858, where the dimensions, tonnage, and character of the *ship, and the terms and conditions upon which she was to be built were discussed. [*154

10. A memorandum was made by the plaintiff at the said meeting, containing the heads of the arrangement, which memorandum was as follows:—"Ship of 300 tons: to be called a despatch-vessel; to be a fore-topsail schooner; to carry one pivot-gun long 32, and 4 light guns carronade class; to have engines of 60 horse-power; to be a sea-going vessel possessing the best sailing qualities; to have a lifting screw; plans and drawings to be prepared for approval of the Admiral; 26*l.* per ton. Engines, 60 horse, 50*l.* per horse. Payments, five instalments." At this meeting it was also arranged that the plaintiff was to complete the vessel in eight months from that time; and it was arranged that there should be two separate contracts, one for the ship, and the other for the engines.

11. After this meeting, two drawings and a model of the said ship were on or about the 9th of June prepared by the plaintiff in accordance with the said memorandum.

12. On the 3d of June, 1858, the plaintiff wrote to Mr. Theobald as follows:—

"20, Great George Street.

"June 3d, 1858.

"My dear Sir,—I hope you are getting the contract for the Portu-

guese vessel and engines ready for signature. Meanwhile I am purchasing the materials and proceeding with the work. When do you think you will be ready? "J. SCOTT RUSSELL."

13. On the same day, Mr. Theobald sent the plaintiff the following answer:—

"16, Furnival's Inn, E. C.
"3d June, 1858.

*155] "My dear Sir,—I have to acknowledge the receipt *of your note of to-day. I have not yet prepared the contracts; but, as we have arranged the terms, there is no objection to your proceeding with the work. "JNO. P. THEOBALD."

14. Shortly after this, the plaintiff received from Sir G. R. Sartorius the following letter:—

"15th June, 1858.

"My dear Mr. Scott Russell,—I have just received orders to make your vessel 400 tons, and 80 auxiliary horse-power. Pray let me know immediately the earliest period it can be got ready. I must have this information to-morrow. "G. R. SARTORIUS."

15. The plaintiff answered it as follows:—

"20, Great George Street.
"June 17, 1858.

"My dear Sir,—I have this moment returned to town from a short absence, and in conformity with your instructions shall immediately proceed to alter the ship from 300 to 400 tons, and the engines from 60 to 80 horse-power. In regard to time, I shall do all in my power to prevent this change from occasioning any delay, and, if possible, to finish the larger ship in the time agreed for the smaller. As, however, I had already purchased a considerable quantity of the materials, and completed many of the patterns and plans for the smaller size, it will require a good deal of pushing on my part to get the proposed vessel done in the original time. But I can assure you this, I will push on the work as fast as consistent with good workmanship.
"J. SCOTT RUSSELL."

16. The following further letters passed on the subject between the plaintiff and Mr. Theobald:—

"June 17th, 1858.

*156] "My dear Sir,—I enclose you a copy of some *correspondence between myself and Admiral Sartorius, with which it is necessary you should be acquainted for the purpose I presume of making the necessary alterations in the formal contracts.
"J. SCOTT RUSSELL."

"23d June, 1858.

"My dear Sir,—The Admiral will be glad to receive the drawings of the ship, which is to be 400 tons instead of 300, and the engines 80 horse-power instead of 60, as originally proposed.
"JOHN P. THEOBALD."

"June 24th, 1858.

"My dear Sir,—I am preparing new sets of drawings both of the ship and engines; but, as all the drawings, calculations, and prepara-

tion of materials and models for the vessel of 300 tons and 60 horse-power are no use to me for the vessel of 400 tons and 80 horse-power, I have all my work to do over again, and therefore you will see that a little delay must inevitably arise, but it shall be as little as possible. As I understood from the Admiral that Lloyds' surveyors were to survey the ship on behalf of the Portuguese government, I have seen the surveyors, in order to get their decision on various points in the construction of the vessel, so that she may be in conformity with Lloyds' rules of classification for A. 1, 13 years. I have also availed myself of the privilege of consulting Mr. Chatfield, the master builder of Deptford Dockyard, on points where I wished the vessel to be in conformity with the practice of Her Majesty's navy. I presume that in doing so I have done what is most agreeable to the Admiral's wishes and the interests of the Portuguese government.

"J. SCOTT RUSSELL."

17. In consequence of the increase of the size of the *vessel proposed and assented to as aforesaid, it became necessary for [*157 the plaintiff to prepare entirely new drawings for the construction of the ship, and to provide further materials, and make fresh arrangements and calculations adapted to her increased size and tonnage.

18. On the 6th of July, 1858, the plaintiff sent to Sir G. R. Sartorius the following letter, together with the rough tracing to which it refers, being a tracing of the ship as enlarged:—

"July 6th, 1858.

"Dear Admiral Sartorius,—I enclose you the rough tracing, which is not quite exact, but will probably suit your purpose. As I have not kept a copy, you will oblige me by returning it when you have done with it. "J. SCOTT RUSSELL."

19. To this letter the plaintiff received the following reply:—

"8 July, 1858.

"My dear Mr. Scott Russell,—I was looking at the drawing of your vessel in company with the officer who will probably command her. He pressed very hard to change the rig to three mast; and, amongst other reasons, he said we Portuguese are unaccustomed to the large cutter sails, pointing to the boom mainsail and boom: the latter frightens him very much. As I know to be quite true what this officer says about the Portuguese sailor, we must change our rig to the three-master's. Three fore-and-aft-sails on the lower masts, and two gaff-topsails, and square foretopsail and foretopgallant sails, square foresail to set flying, and the usual head sails. "G. R. SARTORIUS.

"P. S. I must add also, that, on looking at the masting, I had quite forgotten that we had changed from 300 to 400 tons."

*20. After receipt of this letter, the plaintiff caused a change [*158 to be made in the rigging and sail plans of the vessel in accordance with the suggestions contained in the letter; and final construction drawings and plans of the vessel as altered were then completed, viz.,—first, a complete tracing of lines,—secondly, longitudinal section, with transverse section, showing the general arrangements of timber and place of engine-room, bulkheads,—thirdly, deck-plan,

showing the places of the three masts, &c., funnel, and engine-room bulkheads,—fourthly, lower deck-plans, showing same,—fifthly, sail plan, with three masts.

21. These drawings and plans were the final and only construction drawings of the vessel as altered, and are the drawings and plans referred to in the contract of the 16th of November, 1858. Copies were appended to the case.

22. The alteration in her intended size and tonnage, and the consequent necessity for preparing fresh drawings and plans, and providing further materials, occasioned considerable delay in the commencement of the ship: but the building of the ship was actually commenced in the course of the first week in August, 1858.

23. The plaintiff afterwards received from Sir G. R. Sartorius the following letter:—

"5th August, 1858.

"My dear Mr. Scott Russell,—I have just received a letter from Lisbon, demanding all the drawings for vessel,—internal and external. Pray do not fail to let me have them on Saturday. I shall send one of the officers to see that the keel is laid. "G. R. SARTORIUS."

24. To which the plaintiff sent the following reply:—

*"Arroquhar, August 8th, 1858.

*159] "Dear Admiral,—You will have a set of drawings ready for you at George Street on Monday 16th, at 12 o'clock. The keel and midship body frame were in hand on Wednesday, when I left London; but I don't think we shall place them for a few days to come. Your friends in Portugal should understand that their having altered the size and power of the ship to others for which we have no precedent, there is an amount of consideration and calculation necessary, of which they do not seem to have an adequate notion. They should also know that those changes have altered all the scantlings of materials required by Lloyds' rules, which alterations I finally obtained from Lloyds' only at the end of last week. But on my part there is no delay; and the ship is now proceeding as rapidly as possible. J. SCOTT RUSSELL."

25. The plaintiff accordingly prepared and sent to Sir G. R. Sartorius tracings of all the said final constructions, plans, and drawings, which were sent by the said Sir G. R. Sartorius to Lisbon for the use of the Portuguese government, and have been retained at Lisbon.

26. The building of the ship after it commenced was carried on under such supervision on the part of Sir G. R. Sartorius as is provided for by the contract, and under the supervision of two of Lloyds' surveyors employed for that purpose on behalf of the Portuguese government. Two Portuguese agents also were employed on board the ship by the Portuguese government, to watch the progress of the works.

27. On the 27th of October, the plaintiff received a letter from Mr. Theobald, of which the following is a copy:—

"27th October, 1858.

*160] "My dear Sir,—I think the formal contracts for the *ship and engines which you are constructing for the Portuguese

government ought now to be executed. I therefore send drafts of the same for your perusal and approval. In going through them, you will find some queries to answer. JOHN P. THEOBALD."

28. The drafts enclosed in this letter were one of a contract for the building of the ship, and the other for the supply of the engines; but, some of the provisions not being applicable to a vessel of the class of the Donna Maria Anna, the plaintiff made some alteration in the drafts, and returned them to Mr. Theobald with the following letter:—

"November 2d, 1858.

"My dear Sir,—I return you the draft of contract for engines so corrected as to suit our kind and size of engines. The schedule in the draft has evidently been prepared for engines and ship of a much larger size. I send the bills for acceptance (2132*l.* and 1025*l.*).

"J. SCOTT RUSSELL."

29. The bills here mentioned were two bills of exchange, one for 2132*l.*, being the first instalment, with six months' interest, for the ship, and the other for 1025*l.*, being the first instalment for the engines.

30. Prior to the execution of the contract of the 16th of November, 1858, it was arranged that the time for building the ship should be extended to the 25th of April, 1859.

31. The contracts for the ship and for the engines were respectively executed, and the above bills were delivered to the plaintiff duly accepted, on the 16th of November, 1858.

32. The following is a copy of the contract for the ship:—

"Articles of agreement indented and made the 16th of November, 1858, between John Scott Russell, of *No. 20, Great George Street, in the city and liberty of Westminster, in the county [*161 of Middlesex, ship-builder, of the one part, and His Excellency, Viscount Sa da Bandeira, Minister of Marine of His Most Faithful Majesty, Pedro the 5th, King of Portugal, of the other part: Whereas, it hath been agreed by and between the parties hereto that the said John Scott Russell shall at his ship-building yard at Milwall, in the county of Middlesex, build, fit, and finish for the said Viscount Sa da Bandeira, as such Minister of Marine as aforesaid, in a good, substantial, and workmanlike manner, and with good sound materials of all kinds as prescribed by Table A. of Lloyds' registry for ships of the class A 1, 13 years, and to the satisfaction of Vice-Admiral Sir G. R. Sartorius, acting for and on behalf of the said Viscount Sa da Bandeira, as such minister as aforesaid, a steam screw fore-topsail schooner of 400 tons burthen, to carry one pivot-gun of 32 pounds, and four other light guns of the carronade class: The said ship to be launched, fitted, finished, and delivered at the respective times hereafter mentioned, and to be of the dimensions and tonnage hereinafter set forth, at or for the price or sum of 10,400*l.* of lawful money current in Great Britain, being at and after the rate of 26*l.* for each and every ton: Such price or sum to be inclusive of all charges of every description; except as hereinafter mentioned; the same sum of 10,400*l.* to be paid by instalments at the times and in the manner hereafter mentioned: Now, therefore, in pursuance of the said agreement, and in consideration of the premises, and of the said price or sum of 10,400*l.* of lawful

money current in Great Britain, to be paid by the said Viscount Sa da Bandeira, as such minister of marine as aforesaid, to the said John Scott Russell, at the times and in manner hereinafter mentioned, he
*162] the said John Scott Russell doth hereby, for himself, his *heirs, executors, and administrators, covenant, promise, and agree to and with the said Viscount Sa da Bandeira to build and construct for His said Most Faithful Majesty a steam screw fore-topsail schooner ship or vessel of the following dimensions,—that is to say, &c., &c. Burthen 400 tons; and the same to carry one pivot-gun of 32 pounds, and four light guns of the carronade class: The said ship or vessel to be built and constructed agreeably to drawings which have been delivered by the said John Scott Russell to and signed by the said Vice-Admiral Sir G. R. Sartorius in testimony of his approval thereof; and the same ship or vessel shall be built and constructed with the best materials of all kinds and as prescribed by Table A. of Lloyds' register of ships of the class A 1, 13 years, for which class the said ship or vessel shall be constructed as to materials: And the said John Scott Russell hereby further covenants and agrees with the said Viscount Sa da Bandeira, as such minister as aforesaid, that he will at his costs and risk launch the said ship in every respect ready for sea, on or before the 25th of April, 1859; and all the shipwrights' work, labour, and material usually supplied and rendered by ship-builders for the proper erection of the machinery (the same now being manufactured by the said John Scott Russell) shall be provided and furnished by the said John Scott Russell, who shall also provide and furnish all joiners' work in the engine-rooms: And the same ship or vessel, to be constructed, built, finished, fitted, and found at the sole risk, charge, and expense of the said John Scott Russell, shall be delivered by him at Millwall aforesaid on or before the said 25th of April, 1859, to the order of Sir G. R. Sartorius, ready for sea, finished, fitted, found, and equipped in manner similar in all respects to that which is practised with ships or vessels of the same
*163] *class in Her Majesty's navy under contracts with the Admiralty, except machinery (the same now being manufactured as aforesaid by the said John Scott Russell under another contract), armament, furniture, stores, plate, linen, glass, crockery, and opticians' instruments (other than ship's compasses and azimuth, which the said John Scott Russell shall supply): The said ship or vessel to be at the sole charge and expense of the said John Scott Russell during the construction, equipment, and delivery therof, including ship-keeping dock, and port rates (if any), cost of dock and undocking, of graving-pits, tugs, and pilotage, and every other expense to be incurred with the said ship or vessel, until the same shall be delivered over as hereinbefore mentioned complete and ready for sea in every respect, and until the same shall have been approved of in writing by the said Sir G. R. Sartorius and accepted by him on behalf of the said Viscount Sa da Bandeira: And it is agreed that the said Sir G. R. Sartorius, and any persons or person deputed by him, shall be at liberty at all reasonable times to enter, view, and inspect the said ship or vessel and the materials being used or about to be used for the same: And it is further agreed between the said parties hereto, and particularly the said John Scott Russell doth agree, that the said ship or vessel,

and all materials in the course of preparation or use for the same, shall, from and after the payment as hereinafter mentioned of the first instalment of the said purchase-money or sum of 10,400*l.*, belong to and be the property of his said Most Faithful Majesty, Pedro the 5th, King of Portugal, and the same shall be charged with and stand as a security for the money advanced or paid upon or in respect of the same in pursuance of this agreement: and a board or boards shall be affixed by the said John Scott Russell to the said ship or vessel, with a notice written or *inscribed thereon that the same is the property of His Most Faithful Majesty,—to the end and intent [*164 that the said ship or vessel shall not after such payment as aforesaid, be or become liable or subject to the debts, contracts, or engagements, or otherwise be affected by any act or default of the said John Scott Russell, his executors or administrators, to the prejudice of His Most Faithful Majesty; and that the said John Scott Russell, his executors or administrators, shall and will, if necessary, or if he shall be required so to do, at any time after the said ship or vessel shall have been launched and delivered as aforesaid, by some proper deed or instrument in writing assign or otherwise assure the same free from incumbrances to his said Most Faithful Majesty, or as the said Sir G. R. Sartorious shall direct: And the said Viscount Sa da Bandeira, as such minister of marine as aforesaid, in consideration of the said ship or vessel being so built, launched, finished, fitted, and delivered as aforesaid, doth hereby agree to and with the said John Scott Russell in manner following, that is to say, that he will pay or cause to be paid unto the said John Scott Russell, his executors, administrators, and assigns, the said purchase-money or sum of 10,400*l.*, by five instalments, in the proportions and at the times following, that is to say, the sum of 2080*l.*, part of the said sum of 10,400*l.*, on the execution of these presents; the further sum of 2080*l.*, further part of the said sum of 10,400*l.*, when the keel of the ship or vessel shall have been laid; the further sum of 2080*l.*, further part of the said sum of 10,400*l.*, when the said ship or vessel shall be in frame; the further sum of 2080*l.*, further part of the said sum of 10,400*l.*, when the said ship or vessel shall be in every way ready and in a proper state to receive the steam-engines and machinery to be fitted in the same; and the further sum of 2080*l.* *(residue of the said purchase-money [*165 or sum of 10,400*l.*), on the delivery at the time and place aforesaid of the said ship or vessel finished, fitted, and equipped in every respect ready for sea as aforesaid, to the satisfaction in writing of the said G. R. Sartorius,—the said several payments to be made by bills drawn by the said John Scott Russell on and accepted by the financial agent in London of his said Most Faithful Majesty, and payable in London; the said bills for the said several instalments to be respectively made payable six months after date,—each bill to bear interest from the date thereof until payment, at the rate of 5*l.* per cent. per annum, such interest to be added to and included in each bill: And it is hereby expressly agreed and declared between and by the said parties hereto, that the said purchase-money or sum of 10,400*l.* is inclusive of all charges for the said ship or vessel finished and fitted perfectly in every respect); and no charges shall be demanded for extras: But any additions which may be made by order in writing

of the said Sir G. R. Sartorius as an extra or extras, shall be paid for at a price to be previously agreed upon in writing: And for the true and punctual performance by the said John Scott Russell of the covenants and agreements hereinbefore on his part contained, he the said John Scott Russell doth hereby further agree with the said Viscount Sa da Bandeira, as such minister of marine as aforesaid, that, if he should not launch and deliver the said ship or vessel at the time and place and in manner aforesaid, fitted and completed in manner aforesaid, then and in that case he the said John Scott Russell shall and will pay to the said Viscount Sa da Bandeira, as such minister as aforesaid, the sum of 5*l.* of lawful British money aforesaid for each day thereafter that the said ship or vessel shall not be delivered, finished,
*166] fitted, and completed *as aforesaid, as and for ascertained and liquidated damages, and not by way of penalty only; and the same shall be recoverable in any of Her Majesty's Courts of record at Westminster, or shall, at the option of the said Viscount Sa da Bandeira, be deducted from the said sum of 10,400*l.*: Provided always, nevertheless, that, if the said ship or vessel shall not be launched and delivered by the said John Scott Russell at the time hereinbefore appointed for the launching and delivery thereof as aforesaid, by reason of any cause not under the control of the said John Scott Russell, the same to be proved to the satisfaction of the said Sir G. R. Sartorius, and to be certified by him in writing, then the said penalty shall not be enforced for such number of days or for such a time as the said Sir G. R. Sartorius shall in such certificate name: Provided always, and it is hereby mutually agreed between the said parties hereto, that, inasmuch as the workmanship and materials for the said ship or vessel, and the finishing and fitting of the same, is and are to be subject to the approval of the said Sir G. R. Sartorius, that, if he should be dissatisfied with the same, and should refuse his certificate or satisfaction, he the said John Scott Russell shall be entitled to demand in writing an arbitration in the usual manner, one arbitrator to be nominated on either side, and an umpire to be nominated by the arbitrators before proceeding to business; and, if either party hereto shall fail to nominate his arbitrator for the space of seven days after such demand, the one to be appointed by the other party within such time may proceed to hear evidence and make his award on the matter in dispute: and, if the award should be in favour of the said John Scott Russell, such award shall be equivalent to a certificate of satisfaction in respect of the matters referred. In witness," &c.

*167] *33. The other contract it is not necessary to set out at length. By it the plaintiff engaged to make the engines adapted for the ship, and to deliver them at Milwall whenever required so to do in writing by Sir G. R. Sartorius after the 25th of April, 1859; and also to erect and fit the said engines into the ship, and set them and the machinery to work to the satisfaction of Sir G. R. Sartorius within six weeks after the delivery thereof as aforesaid.

34. The bills for the second and third instalments due under the ship-building contract were respectively dated the 20th of December, 1858, and the 8th of January, 1859, and were duly accepted, and the bill for the fourth instalment was dated the 5th of March, 1859, and was duly accepted.

35. Whilst the said ship was in course of being built, express verbal orders were from time to time given either by Sir G. R. Sartorius in person, or, with his sanction, either by the said persons employed to watch the progress of the works, or by the captain appointed to command the said ship, for all the work, materials, and goods comprised in and forming the subject of the said accounts A. and B.; and all the said work was done and the said materials and goods were supplied by the plaintiff upon and in pursuance of such orders.

36. All the various charges in the said accounts A. and B. may, as regards the nature of the said work, materials, and goods, be classified as follows, viz. A. charges for work, materials, and goods which (as now admitted by the defendant) are in excess of or vary substantially from the requirements of the said contract and drawings,—B. charges for extra time consumed in alterations of work which had previously and in accordance with the said contract and drawings been completed, —C. charges for the extra expense of work *answering to the general requirements of the said contract and drawings, but [*168 rendered, by special orders as to the mode of performing it, of a character more expensive than is usual in such a ship as described in the said contract and drawings,—D. charges for work and materials not required or usually done or supplied in or to ships built by private ship-builders under contracts with the Admiralty, nor required for the purpose of procuring the registration of the ship at Lloyds' in the class A. 1, 13 years.

37. No order for extras was ever given in writing by the said Sir G. R. Sartorius, either with or without a price previously agreed upon in writing. On various occasions during the progress of the said ship-building, the said Sir G. R. Sartorius, and on other occasions the said Portuguese agents employed to watch the ship-building as aforesaid, required various portions of the work to be suspended until the decision of the said Sir G. R. Sartorius or of the said Lloyds' surveyors could be obtained upon objections made by the said Sir G. R. Sartorius or the said Portuguese agents, sometimes to the quality of the materials, and others to the proposed mode of doing the work; and such portions of the work were suspended accordingly.

38. Upon the occasions referred to, there was no default on the part of the plaintiff; but the said objections and the suspension of the said work, together with the extra time required for the execution of the work comprised in the said accounts A. and B., caused a delay in the whole of about six weeks in the progress of the entire ship-building: but it was not proved, that, even without such delay, the said ship could with the number of hands employed on her by the plaintiff have been finished in the time specified in the said contract.

39. As early as the 14th of March, 1859, the plaintiff *gave notice to Sir G. R. Sartorius, that, in consequence of these [*169 delays, the ship was not likely to be finished by the stipulated time.

40. When the ship was *nearly completed*, Sir G. R. Sartorius required a quantity of articles to be supplied to the ship which he insisted the plaintiff was by the terms of the contract of the 16th of November, 1858, bound to supply, and which the plaintiff on the other hand con-

sidered he was not bound to supply and refused to supply; and, after some delay had occurred in discussing this question, Mr. Theobald wrote to the plaintiff the following letter:—

"30th July, 1859.

"My dear Sir,—Admiral Sartorius is very desirous that the ship should be ready for sea at the earliest possible time, and therefore, with the view to preventing any unnecessary delay, let all the articles supplied by our Admiralty to ships of the same class as the Donna Anna Maria, under the Admiralty warrants, be supplied forthwith by you, without prejudice to the question whether they are to be supplied by you under the contract at your cost or not.

JOHN P. THEOBALD."

41. With respect to vessels built for Her Majesty's navy by private ship-builders under contract with the Admiralty, the invariable course of proceeding has been for the ship-builder to enter into a contract with the Admiralty to build the hull according to a specification by which the ship-builder agrees to build and deliver the hull complete with certain hull-fittings or fixtures for the attachment of the rigging, and all inside fixtures: but all other things, including masts, yards, rigging, sails, boats, anchors, cables, cabin furniture, and all movable things of every description necessary to complete the fitting and sea-
*170] going equipment *and provisioning of the ship, are provided by the Admiralty out of the government stores or warehouses in the dockyard.

42. No instance has been proved of a contract by a private ship-builder with the Admiralty binding the former to build a ship for Her Majesty's navy in accordance with Lloyds' rules or tables, or to fit, find, or equip a vessel ready for sea.

43. All the articles supplied by the Admiralty to a ship built by contract, and whether for immediate or future use, are known and denominated in Her Majesty's dockyards as "stores;" and these are supplied from the dockyards in pursuance of warrants issued by the Admiralty authorities, which are known by the name of Admiralty warrants, in which the various articles to be supplied are enumerated and described. These stores are distinguished by the Admiralty authorities as "Carpenters' stores," "Boatswains' stores," "Gunners' stores," "Pursers' stores," "Engineers' stores," and "Medical stores," and the like.

44. "Carpenters' and Boatswains' stores" would include everything necessary to fit the hull for actual navigation; "Gunners' stores" would comprise everything necessary to her armament; "Pursers' stores" would include everything in the shape of victualling and provisions; but the word "stores" is understood in the Queen's navy as a generic term, and is not used without some prefix or qualification to express any particular portion of the ship's equipment or provisions.

45. In the mercantile marine, the masts, sails, rigging, boats, anchors, and cables, are denominated "outfit" or "equipment," and not "stores." Everything else of a movable description supplied to a merchant-ship passes under the denomination of "stores."

*171] 46. Lloyds' rules,—a copy of which was annexed to *the case,—indicate the quantity of rigging, masts, spars, yards,

sails, sailing and other gear and tackle, anchors, cables, &c., proper to be supplied to vessels, according to the various classifications mentioned in the tables attached to such rules; and also the quality of the timber and materials, and character of workmanship, necessary for the various classifications.

47. In order to be classified at Lloyds' as A. 1, 13 years, a vessel must be built of timber of a specified quality, and with copper weather-bolts, and of good workmanship; and, in order to be registered at all under the letter A. 1, she is also required to have new and good masts, one complete suit of sails, and a spare topsail, spare foretopmast-staysail, good standing and running rigging, either wire or hemp, also 200 fathoms of 1½ inch chain-cable, 90 fathoms of 7 inch, and 90 fathoms of 5 inch hawsers; also 3 bower anchors, one storm anchor, and 2 kedges, of certain weights. She must also have pumps, a capstan and riding bits, and one boat, and one jolly-boat; but nothing further is required for the purpose of such classification.

48. As eventually finished, the vessel was constructed and was provided in all respects in the manner required for the purpose of being classed as A. 1, 13 years at Lloyds'; and no extra charge is made for anything done or supplied in accordance with Lloyds' rules.

49. A steam vessel of the class of the Donna Maria Anna, built and supplied in the manner required for the class A. 1, 13 years at Lloyds', would, if properly manned, coaled and provisioned, and supplied with proper furniture and accommodation for the officers and crew, be ready to sail and fully competent to the voyage from London to Lisbon. But vessels in Her Majesty's navy of the class of the Donna Maria Anna, when commissioned for active service, are furnished *under Admiralty warrants with various articles and [*172 materials not required by Lloyds' rules, viz. with a certain additional quantity of spars as well as standing rigging, spare masts, spare yards, spare sails and sailing and other gear and tackling of every description, spare anchors, cables, cordage, and ground-tackling, as well as with cabin and other furniture, cooking-apparatus, and with provisions and other necessaries for the subsistence of the officers and men.

50. Immediately after the letter of the 30th of July, 1858, Sir G. R. Sartorius furnished the plaintiff with an Admiralty warrant comprising the various stores and materials which he required the plaintiff to supply in addition to the outfit and equipment required by Lloyds' rules; and the plaintiff accordingly thereupon supplied the same upon the terms of the said letter. The articles thus supplied make up, with the addition of a charge for costs of alterations and additions in rigging hereinafter referred to, the said account marked C.

51. The defendant contends that the plaintiff, under his contract to fit, find, and equip the ship ready for sea, was, with the exception of provisions or consumable stores, bound to fit, find, and equip her in the same way in which ships of her classification in Her Majesty's navy are fitted, found, and equipped when commissioned for active service.

52. The delay in completing and delivering the ship caused considerable expense and inconvenience to the Portuguese government;

and, on the 3d of August, 1859, Mr. Theobald wrote to the plaintiff as follows:—

"3d August, 1859.

"My Dear Sir,—Admiral Sartorius has telegraphed for the crew of the Donna Maria Anna. The men will come over by the packet which leaves Lisbon on the 7th, and will be here on Monday, the 12th instant. I trust the ship will be ready by that time. The minister is much vexed at the delay; and the question as to penalties will become a serious matter.

"JOHN P. THEOBALD."

53. The vessel was launched on the 15th of August, 1859, with her engines on board fitted ready for work.

54. After the ship was launched, Mr. Theobald, by order of Sir G. R. Sartorius, on the 2d of September, 1859, wrote to the plaintiff, as follows:—

"2d of September, 1859.

"My dear Sir,—I am directed by Admiral Sartorius to say the three yards to the foremast will not do. They must be six feet wider, and thicker. Another shroud on each side must be added. The sails ought not to have been bent until the ship was ready. The captain says he mentioned this to the rigger. If the sails should be injured, the Admiral will not pass them. The crew will be on board on the 11th instant. Pray let the above matter be attended to at once, so as to prevent any dissatisfaction.

"JOHN P. THEOBALD."

55. The alterations and additions proposed in this letter were not in accordance with, but varied from, the said construction, drawings and plans, so far as they relate to the rigging: but the alterations and additions were afterwards made by the plaintiff, and are comprised in the said account C., in which they are charged as follows,—"Cost of alterations and additions made in rigging, 116*l.* 8*s.* 0*d.*"

56. On the 12th of September following, the plaintiff wrote a letter to Mr. Theobald, inclosing two drafts, one for 2132*l.*, being the last instalment due under the contract for building the ship, and the other for 1353*l.*, being the last instalment due under the contract for providing the engines. The following is a copy of that letter:—

*"September 13th, 1859.

*174] "My dear Sir,—As we have tried the Portuguese vessel, and found all right, I presume you have no objection to accept the inclosed drafts. This, of course, has nothing to do with the stores and extras which I am providing according to your instructions; and I have given orders to make the alterations and additions in the spars, rigging, and sails of the ship which the Admiral has ordered, to meet the wishes of the captain, and which also have nothing to do with the contract. Please to return the enclosed drafts duly accepted as soon as convenient. As I shall be out of town some time, you may consider Mr. Wright as representing me, and his signature as mine for the purposes of the contract. "J. SCOTT RUSSELL."

57. Mr. Theobald answered this letter as follows:—

"My dear Sir,—"I cannot get the bills accepted until I have Lloyds' certificate as well as the Admiral's.

"JOHN P. THEOBALD."

58. The plaintiff contended that he was under no legal obligation to obtain a certificate from Lloyds'; nevertheless, he was quite willing to obtain one, and accordingly did so.

59. On the 30th of September, the plaintiff wrote to Mr. Theobald, as follows:—

"September 30th, 1859.

"My dear Sir,—Will you appoint an early day when the Admiral and you and I can meet and formally close our accounts, and sign, seal, and deliver the ship with her extras and stores. Probably on board the ship would be best.

"J. SCOTT RUSSELL."

60. To this letter Mr. Theobald replied on the 6th of October,—

*"6th October, 1859.

"My dear Sir,—On my return to town, I received yours of [*175 the 30th ultimo. I will see Admiral Sartorius to-morrow if possible, and then write to you again. Is Lloyds' certificate ready?

"JOHN P. THEOBALD."

61. On the 12th of October, Lloyds issued the following certificate that the ship was A. 1, 13 years.

"No. 7676 } Lloyds' register of British and Foreign shipping, No.
24337 } 2, White Lion Court, Cornhill, London.

"11th October, 1859.

"These are to certify that the screw schooner Donna Maria Anna, of Lisbon, D'Albuquerque, master, 250 tons, bound to Lisbon, has been surveyed at London by the surveyors of this society, and reported to be, on the 6th of October, 1859, in a good and sufficient state, and fit to carry dry and perishable cargoes to and from all parts of the world; and that she has been classed and entered in the Register Book of the society with the character A. 1, for 13 years from 1859, subject to periodical survey. Built under special survey.

"Witness my hand,

"JNO. ROBINSON,

"Chairman of the committee of classification.

"G. B. SEYFANG, Secretary.

"Memo. The Donna Maria Anna is reported to be 408$\frac{82}{94}$ tons by the old (commonly called Builder's) mode of measurement.

"1st November, 1859.

"GEO. B. SEYFANG, Secretary."

62. On the 13th of October, Lloyds' surveyor gave the plaintiff a certificate in these terms:—

"Lloyds' Register of British and Foreign Shipping,

"2, White Lion Court, Cornhill, 13th October, 1859.

*"I hereby certify that the screw steamer Donna Maria Anna, [*176 belonging to the Portuguese government, has been completed by Mr. Scott Russell, of Millwall, to my satisfaction; and she has been reported to and classed by the committee of this society.

"B. WAYMOUTH, Surveyor."

63. On the same day, Mr. Theobald wrote to the plaintiff the following letter:—

"13th of October, 1859.

"My dear sir,—The Admiral wishes you to name an early day to try the Donna Maria Anna, and deliver over the ship. I have Lloyds'

certificate. You will be entitled on delivery of the ship to the bill for the last instalment, which I will get accepted. The question as to the articles to be supplied according to the Admiralty warrants will remain open. "JNO. P. THEOBALD."

64. The plaintiff replied as follows:—

"October 14th, 1859.

"My dear Sir,—I have no intention of trying the Donna Maria Anna; nor do I think it desirable to allow any question to remain open as to the stores and spare gear supplied to the ship. It is the custom of my business to settle all such matters on delivery of the ship; and I must repeat my request that you would arrange an early day for me to meet yourself and the Admiral to exchange papers and close the business. I am willing to draw, as formerly, for the amount due on the ship and on the accounts sent you. In exchange for the acceptances, I am ready to hand over the ship and her stores.

"J. SCOTT RUSSELL."

65. The accounts referred to in this letter had previously been sent to Mr. Theobald, one being the *account A., for 1026*l.* 5*s.* 7*d.*,— the other the account C., for 2050*l.* 3*s.*,—together 3076*l.* 8*s.* 7*d.*

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66. The crew arrived in London on the 16th of October, 1859, and went on board that day.

67. The captain had directions to take the vessel down to Greenhithe to have her swung, and to ship her powder, guns, &c., and he thereupon ordered the engineer to get up the steam. The plaintiff, however, refused to allow her to be moved until payment was made of the last instalment and of the said sum of 3076*l.* 8*s.* 7*d.*

68. A few days after the date of this last letter, the account B., for 247*l.* 2*s.*, was delivered to the defendant,—the previous delivery thereof having been inadvertently omitted by the plaintiff's accountants: but the whole of the work therein referred to had been completed when the said account was delivered, and before the execution of the deed of the 12th of November, hereinafter set out.

69. Before this third account had reached Mr. Theobald, he had written to the plaintiff a letter, dated the 17th October, of which the following is a copy:—

"17th October, 1859.

"My dear Sir,—Please name an early day to attend here to receive the bill for the last instalment of the Donna Maria Anna. Your claims for 2050*l.* and 1026*l.* 5*s.* 7*d.* are not admitted, and therefore cannot now be paid; but any proper arrangement will be made so as to secure you, should it ultimately be determined that you are entitled to the whole or a part of those sums. The penalties (which will be enforced) amount to a considerable sum.

"JNO. P. THEOBALD."

70. A correspondence then ensued between the plaintiff's solicitors and Mr. Theobald; and ultimately, on the 12th of November, 1859, the sum of *3076*l.* 8*s.* 7*d.* (being the amount of the first two accounts) was paid into the Bank of England in the joint names of Sir G. R. Satorius and of the plaintiff, upon the trusts declared in the following agreement which was then drawn up and executed by both:—

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71. Articles of agreement made the 12th day of November, 1859,

Between John Scott Russell, of, &c., of the one part, and Vice-Admiral Sir G. R. Sartorius, of, &c., of the other part: Whereas by articles of agreement dated the 16th of November, 1858 (reciting the agreement): And whereas the said several sums of 2080*l.*, 2080*l.*, 2080*l.*, and 2080*l.*, respectively parts of the said purchase-money or sum of 10,400*l.*, have been duly paid to the said John Scott Russell at the times and in the manner in the said agreement mentioned, but the further sum of 2080*l.*, residue of the said purchase-money or sum of 10,400*l.*, has not yet been paid to the said John Scott Russell: And whereas the said ship or vessel is now ready for delivery at Millwall aforesaid to the order of the said Sir G. R. Sartorius: And whereas the said John Scott Russell alleges that the sum of 3076*l.* 8*s.* 7*d.* is due to him from the said Viscount Sa da Bandeira, as such minister of marine as aforesaid, in respect of stores supplied, alleged alterations made, and extra work done by the said John Scott Russell to the said ship or vessel, and he claims to retain possession of the said ship or vessel until the said sum of 3076*l.* 8*s.* 7*d.* is paid to him in addition to the said sum of 2080*l.*, residue of the said purchase-money or sum of 10,400*l.*: And whereas the said Viscount Sa da Bandeira alleges that the said ship or vessel was not launched and delivered at the time and place and in manner aforesaid, fitted and complete in manner aforesaid; and he, as such minister as aforesaid, claims a large sum of money from the said John Scott Russell under the hereinbefore recited *agreement, for or in respect of such delay in launching and delivering the said ship or vessel, but the said John Scott [*179 Russell denies his liability in respect of any such claim as aforesaid: And whereas, for the purpose of releasing the said ship or vessel from all claims of the said John Scott Russell, and of deciding the several questions in dispute between the said John Scott Russell and the said Viscount Sa da Bandeira, as such minister as aforesaid, it has been agreed that the said ship or vessel should be delivered to the said Sir G. R. Sartorius and the said sum of 2080*l.* paid upon the terms hereinafter appearing, and that such arrangements should be entered into as are hereinafter mentioned: And whereas, in pursuance of the said agreement, a bill of exchange for 2132*l.*, being the said sum of 2080*l.* and interest thereon, has been this day delivered to the said John Scott Russell, and the said John Scott Russell has this day delivered the said ship or vessel to the said Sir G. R. Sartorius: And whereas, in further pursuance of the said agreement, the sum of 3076*l.* 8*s.* 7*d.* has been this day deposited in the Bank of England on behalf of the said Viscount Sa da Bandeira as such minister as aforesaid, in the joint names of the said Sir G. R. Sartorius and John Scott Russell upon the trust and for the purposes hereinafter declared and contained of and concerning the same: Now these presents witness, that, in pursuance of the said agreement, and in consideration of the premises, he the said John Scott Russell does hereby renounce all claims of him the said John Scott Russell upon or against the said ship or vessel for or in respect of the said sum of 2080*l.*, the residue of the said sum of 10,400*l.*, and all interest due or to grow due for the same, and for or in respect of the said sum of 3076*l.* 8*s.* 7*d.* so alleged by him to be due to him from the said Viscount Sa da Bandeira, as such *minister of marine as aforesaid, in respect of the stores [*180

supplied and extra work done by the said John Scott Russell to the said ship or vessel as aforesaid, and for or in respect of any other matter or thing whatsoever, and all rights of him the said John Scott Russell of lien upon or detention of the said ship or vessel for or in respect of the said several sums of money, matters, and things, and every of them: And the said John Scott Russell does hereby agree with the said Sir G. R. Sartorius, that he the said Sir G. R. Sartorius shall now have and take the said ship or vessel without any lawful interruption or hindrance by him the said John Scott Russell or any person lawfully or equitably claiming by, from, under, or in trust for him the said John Scott Russell: And he the said John Scott Russell doth hereby further agree with the said Sir G. R. Sartorius, that he the said John Scott Russell, his executors or administrators, will and shall forthwith commence and duly and diligently prosecute an action in, &c., against the said Viscount Sa da Bandeira, his executors or administrators, for the recovery of the sum of 3076*l.* 8*s.* 7*d.* for stores supplied and work done by him the said John Scott Russell to the said ship or vessel: And he the said John Scott Russell does hereby further agree with the said Sir G. R. Sartorius, that he the said John Scott Russell, his executors or administrators, will and shall duly appear to any writ that shall be issued out of any one of Her Majesty's superior courts of common law at Westminster at the suit of the said Viscount Sa da Bandeira, his executors or administrators, in any action that shall be brought by the said Viscount Sa da Bandeira, his executors or administrators, against the said John Scott Russell, his executors or administrators, for the recovery of any sum of money alleged to be due from him the said John Scott Russell to the
*181] *said Viscount Sa da Bandeira, as such minister as aforesaid, under the said hereinbefore-recited agreement, for or in respect of delay by him the said John Scott Russell in launching and delivering the said ship or vessel: And it is hereby agreed and declared between and by the said John Scott Russell and Sir G. R. Sartorius, that no objection shall be taken in the said actions or either of them that the said Viscount Sa da Bandeira is not the proper person to sue or to be sued, or that some other party or parties ought to sue or have been sued or joined as defendant or defendants or plaintiff or plaintiffs in the said actions or either of them; and that they the said John Scott Russell and Sir G. R. Sartorius will hold the said sum of 3076*l.* 8*s.* 7*d.* so deposited in their names in the Bank of England as aforesaid, upon trust, in case no such action as aforesaid shall be brought by the said John Scott Russell, his executors or administrators, against the said Viscount Sa da Bandeira, his executors or administrators, within one calendar month from the date of these presents, or such action shall be brought within such one calendar month, but the same shall not be duly and diligently prosecuted with effect by the said John Scott Russell, his executors or administrators, to pay the said sum of 3076*l.* 8*s.* 7*d.* to the said Viscount Sa da Bandeira or such other person as for the time being shall be the minister of marine of the King of Portugal or his successor for the time being, or as he the said Viscount Sa da Bandeira or such other person shall direct; but, in case such action shall be brought within one calendar month from the date of these presents, and shall be duly and diligently prosecuted, and the

said John Scott Russell, his executors or administrators, shall recover in such action either by judgment or by the award of any arbitrator to whom such action shall be *referred, any sum of money, [*182 then upon trust from and after the determination of any action to be brought by the said Viscount Sa da Bandeira, his executors or administrators, against the said John Scott Russell, his executors or administrators, as hereinbefore mentioned, to pay out of the said sum of 3076*l.* 8*s.* 7*d.* so deposited as aforesaid, to the said John Scott Russell, his executors or administrators, such sum of money, and all taxed costs, charges, and expenses adjudged or awarded to him the said John Scott Russell, his executors or administrators, in such action, after deducting therefrom such sum of money (if any) as the said Viscount Sa da Bandeira, his executors or administrators, shall recover in any action which within one calendar month from the date of these presents shall be brought and duly and diligently prosecuted by the said Viscount Sa da Bandeira, his executors or administrators, against the said John Scott Russell, his executors or administrators, for or in respect of delay by him the said John Scott Russell in launching or delivering the said ship or vessel, whether such recovery shall be by judgment or by the award of any arbitrator to whom such action shall be referred, and all taxed costs, charges, and expenses adjudged or awarded to him the said Viscount Sa da Bandeira, his executors or administrators, in such action, or so much thereof as such sum of 3076*l.* 8*s.* 7*d.* shall be subject to pay; and upon trust to pay the residue (if any) of such sum of 3076*l.* 8*s.* 7*d.* to the said Viscount Sa da Bandeira, or such other person as for the time being shall be minister of marine for the time being: And each of them the said John Scott Russell and Sir G. R. Sartorius does hereby agree with the other of them, that he, his executors or administrators, will and shall sign all such checks and execute and do all such documents and things as may be necessary or *reasonably required by the other of them, [*183 his executors or administrators, for making the several payments hereinbefore provided for of or out of the said sum of 3076*l.* 8*s.* 7*d.* so deposited in the Bank of England in their joint names as aforesaid. In witness," &c.

72. A counterpart of this agreement was executed by the plaintiff under his hand and seal.

73. For the purposes of this case, it was to be taken that Sir G. R. Sartorius has certified in writing, that, with respect to all matters required by the said contract of the 16th of November, 1858, except the completion thereof within the period stipulated, the said vessel has been completed to his satisfaction, provided and on condition only that the work and other matters in respect of which this action is maintained be treated as done and supplied merely in performance of the said contract and as included in the said contract price; the various orders given or sanctioned by the said Sir G. R. Sartorius having been so given or sanctioned under the impression that the plaintiff was bound to execute the work and supply the materials for which this action is maintained, by the terms of the said contract.

74. The defendant had no authority from the Portuguese government to vary the terms of the said contract of the 16th of November, 1858; but, in several instances, when orders have been given by the

said Sir G. R. Sartorius for goods, work, or materials for the use of the Portugese navy, the prices thereof have been paid without objection, on application to the financial agent in London of the said government.

75. No certificate has ever been given by the said Sir G. R. Sartorius in the terms of the said contract of the 16th of November, 1858, or otherwise, that the failure to launch and deliver the said ship
*184] within the *time in the contract stipulated was by reason of any cause not under the control of the plaintiff.

76. On the 16th of November, 1859, this action was commenced: and, for the purposes of this case, it is to be assumed that the action has been prosecuted with due diligence by the plaintiff.

77. The pleadings and other documents in the appendix were to be taken as part of the case.

78. The court were to be at liberty to draw all inferences of fact which a jury might draw.

The questions for the opinion of the court were,—first, whether the plaintiff was entitled to recover in respect of all or any of the different classes of charges contained in the said accounts A., B., and C., or either of them, and, if so, in respect of which he was so entitled,—secondly, what amount of penalties, if any, the defendant was entitled to set off against the plaintiff's claim.

If the court should be of opinion that the plaintiff was not entitled to recover in respect of any of the said classes of charges, or that the defendant was entitled to set off an amount for penalties equal to the aggregate amount of the said accounts A., B., and C., then the verdict was to be set aside, and a verdict entered for the defendant.

If the court should be of opinion that the plaintiff was entitled to recover in respect of any of the said classes of charges, and should not find the defendant entitled to set off a sum for penalties equal to the aggregate amount of the said accounts, then all questions as to the amount of such classes of charges were to be referred to the arbitrator, upon the terms mentioned in the rule of Trinity Term last; and the verdict was to be dealt with in the manner provided by the said rule.
*185] *Bovill*, Q. C. (with whom was *Garth*), for the *plaintiff.(*a*)—The plaintiff's claim is comprised under three heads,—first, 1026*l.* 5*s.*

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That as regards the sums of 1026*l.* 5*s.* 9*d.* and 242*l.* 7*s.* claimed in the particulars, the arbitrator has found in effect that the items for which these sums are charged were works not included in the contract, and consequently that the plaintiff was justified in treating them as 'extras:'

"2. That these items were ordered by agents of the Portuguese government, and that the defendant represents that government for the purposes of this action:

"3. That there is nothing in the contract which can affect the plaintiff's right to sue the defendant for these items:

"4. That, as regards the claims of 2050*l.* 3*s.* for stores, the plaintiff was not bound to provide them under his contract, and that they were expressly ordered by Mr. Theobald, at the instance of Admiral Sartorius:

"5. That, by the agreement of the 12th of November, 1859, the defendant is precluded from contending that any third person is liable or should have been sued for the price either of the stores or extras:

"6. That, as regards the defendant's cross-claim for penalties, the delay caused by the Portuguese authorities in the completion of the ship is a complete answer to that claim:

"7. That, even assuming the plaintiff to be liable for any penalties, the time expended in putting the engines into the ship, and in works and alterations directed by the Portuguese authorities dehors the contract, ought not to be reckoned against the plaintiff."

9*d.* for extra work and alterations done to order, and which are essentially different from the original contract,—secondly, 242*l.* 7*s.* for expensive alterations and additional work done during the progress of the building,—thirdly, 2004*l.* 16*s.* 10*d.* for stores, spare masts and yards, duplicate sails, &c., supplied virtually after the completion of the contract.

By the contract the plaintiff engaged to build, fit, and finish the ship in a good, substantial, and workmanlike manner, and with good and sound materials of all kinds as prescribed by Table A. of Lloyds' registry *for ships of the class A. 1, 13 years, and to the satisfaction of Vice-Admiral Sartorius, for the sum of 10,400*l.*,— [*186 "such price or sum to be inclusive of all charges of every description, except as thereinafter mentioned." The vessel was to be delivered on or before the 25th of April, 1859, "ready for sea, finished, fitted, found, and equipped in *manner similar in all respects to that which is practised with ships or vessels of the same class in Her Majesty's navy, under contracts with the Admiralty*, except machinery, armament, furniture, *stores*, plate, linen, glass, crockery, and opticians' instruments, other than ship's compasses and azimuth, which the said John Scott Russell shall supply." The contract contained this further agreement,—"that the said purchase-money or sum of 10,400*l.* is inclusive of all charges for the said ship or vessel finished and fitted perfectly in every respect; and no charges shall be demanded for extras; but any addition or additions which may be made by order *in writing* of Admiral Sartorius as an extra or extras shall be paid for at a price to be previously agreed upon in writing." The work was done in accordance with the contract; but, in the course of it, the extra work and alterations comprised under the first head of claim were done under orders and directions orally given either by Admiral Sartorius in person, or, with his sanction, either by the agents placed on board by the Portuguese government to watch the progress of the work, or by the captain appointed to command the ship; and because these orders were not given by the Admiral *in writing*, the Portuguese government repudiate the authority of their accredited agents, and seek to evade payment for the work which the plaintiff has done under them. But it is submitted the Court will under the circumstances imply a contract to pay for the work so done.

*As to the 116*l.* 8*s.*, for the alterations required after the [*187 vessel was launched, under the circumstances detailed in paragraphs 54 and 55, the plaintiff is unquestionably entitled to recover these.

Then, as to the stores, spare gear, duplicate sails, &c., as charged in the account C.,—these were altogether dehors the contract. The vessel had already been fitted with proper masts and spars and all extra stores required by Lloyds' regulations. The claim under this head is for additions to the outfit and equipment required by Lloyds' regulations, and which the plaintiff insists he was not bound by his contract to supply, inasmuch as they are not necessary for the vessel's obtaining her classification, and are not usually supplied to vessels of this description in Her Majesty's navy, except when commissioned for active service. These were supplied upon the faith of Mr. Theo-

bald's letter of the 30th of July, 1859, and the undertaking therein given by the authority of Admiral Sartorius. By the contract, the plaintiff engages that the ship shall be "ready for sea, finished, fitted, found, and equipped in manner similar in all respects to that which is practised with ships or vessels of the same class in Her Majesty's navy under contracts with the Admiralty, except machinery, armament, furniture, stores, plate, linen, glass, crockery, and opticians' instruments, other than ship's compasses and azimuth." Paragraphs 41 to 51 show that this stipulation had already been duly performed by the plaintiff before the articles in question were required or provided by him.

The defendant claims to set off against any sum the plaintiff may be entitled to recover a large sum in respect of penalties said to have been incurred by the plaintiff for not having completed his contract by the day stipulated. The plaintiff's answer to that claim is, that
*188] the defendant's agents having for their own *pleasure, and without any default on the part of the plaintiff,—see paragraphs 37, 38,—suspended the progress of the work for about six weeks in all, the stipulation as to time is gone altogether, and the penalties cannot be enforced. Holme *v.* Guppy, 3 M. & W. 387,† is precisely in point. There, the plaintiff, on the 19th of April, 1836, entered into a written contract to build, for the sum of 1700*l.*, a brewery for the defendants, so far as regarded the carpenters' work, within the space of four months and a half next ensuing the date of the agreement; and, in default of completing the same within the time thereinbefore limited, to forfeit to the defendants 40*l.* per week for each week that the completion of the work should be delayed beyond the 31st of August, the amount to be deducted from the 1700*l.* as liquidated damages. The plaintiffs did not begin the work for four weeks after the date of the agreement, in consequence of the defendants not being able to give them possession; they were afterwards delayed one week by the default of their own workmen, and four weeks by the default of the masons employed by the defendants; and the work was not completed till five weeks after the time limited: and it was held that the defendants were not entitled to deduct from the 1700*l.* any sum in respect of the delay, either for the one or the four weeks. "The plaintiffs," says Parke, B., "undertake that they will complete the work in a *given* four months and a half; and the particular time is extremely material, because they probably would not have entered into the contract unless they had those four months and a half, within which they could work a greater number of hours a day. Then it appears that they were disabled by the act of the defendants from the performance of *that* contract: and there are clear authorities, that, if the one party be prevented by the refusal of the other contracting
*189] party from *completing the contract within the time limited, he is not liable in law for the default.(*a*) It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract; and there is nothing to show that they entered into a new contract by which to perform the work in four months and a half ending at a later period. The plaintiffs were therefore left at large; and consequently they are not to forfeit anything

(*a*) 1 Rol. Abr. 543; Comyn's Digest, *Condition* (L. 6).

for the delay." The obligation as to time once gone, it is released for ever. [ERLE, C. J.—Upon the principle laid down by Lord Coke in Dumpor's Case, 4 Co. Rep. 119 b.] Holme *v.* Guppy was recognised by this Court in Thornhill *v.* Neats, 8 C. B. N. S. 842 (E. C. L. R. vol. 98). And the certificate clause in the contract makes no difference in this respect.

Collier, Q. C. (with whom were *Petersdorff*, Serjt., and *Macnamara*), for the defendant.(*a*)—The defendant, *having himself only a limited authority, contracts under seal, naming Admiral Sartorius as his agent with a limited authority also. The intention of the parties to this contract was, that the plaintiff should furnish a *vessel "finished, fitted, found, and equipped," and ready for sea as an armed vessel in the Portuguese navy. [BYLES, J.— [*190 [*191

(*a*) The points marked for argument on the part of the defendant were as follows:—

"1. That the plaintiff is not entitled to recover all or any of the different classes of charges contained in the accounts A., B., or C., or either or any of them; the same being included in the work and materials contracted for by the indenture of the 16th of November, 1858:

"2. That, if any part of the said charges are recoverable at all, they cannot be recovered in the form of action adopted by the plaintiff; the rights and liabilities of the parties being created and defined by that indenture:

"3. That the said Sir G. R. Sartorius mentioned in the said indenture, had no authority, and could not bind the defendant or the Portuguese government by any orders given or concurred in or sanctioned by him, not consistent with the restricted agency described in the said indenture:

"4. That the said Sir G. R. Sartorius, as the restricted or limited agent of the government, could not dispense with or waive the condition that 'no charges shall be demanded for extras, but any addition or additions which may be made shall be by order in writing, and paid for at a price previously agreed upon in writing:'

"5. That the official representative of a foreign state, with limited and plainly defined powers, cannot bind or affect his principal beyond the expressly defined limits of his authority:

"6. That the known official position of Sir G. R. Sartorius precludes any inference of any implied extension of power or authority or any right to deviate from the prescribed duties of his office:

"7. That the present is distinguishable from an ordinary case of orders being given for alleged extras; the party giving them not being the principal, but an avowed agent with restricted powers:

"8. That the plaintiff, before executing any works for extras, should have communicated to the defendant or his agent that the order required to be executed would be an extra charge, and beyond the contract:

"9. That the said Sir G. R. Sartorius had no power to authorize others to give orders binding upon the defendant or the Portuguese government:

"10. That there are no facts from which it can be fairly inferred that the defendant sanctioned or confirmed any orders for any of the works or materials sought to be recovered as extras:

"11. That the defendant himself, to the knowledge of the plaintiff, was only a public servant contracting in his official capacity, and acting under a limited authority from the Portuguese government:

"12. That Sir G. R. Sartorius has never granted a written certificate according to the terms of the contract:

"13. That the plaintiff did not deliver and launch the said ship or vessel within the time and in the manner required by the said contract:

"14. That a large amount of penalties were incurred by such non-performance of the contract, which have never been certified in writing by the said Sir G. R. Sartorius that they should not be enforced, nor has the right to enforce them been in any way abandoned:

"15. That any delay occasioned by performing unauthorized extras cannot exonerate the plaintiff from liability to the penalties:

"16. That the correspondence set out in the case as to the said extras cannot render the defendant liable, nor can the articles of agreement of the 12th of November, 1859, vary the rights or liabilities of the parties:

"17. That the plaintiff's equitable replication contains no answer to the defendant's plea of set-off, and is bad in law."

Not as an *armed vessel*,—but "equipped in manner similar in all respects to that which is practised with ships or vessels of the same class in Her Majesty's navy under contracts with the Admiralty, *except* machinery, *armament*, furniture, stores," &c.] The contract was framed under an evident misconception as to what was the practice with regard to vessels built by private builders under contracts with the Admiralty. The 41st paragraph of the case finds, that, under Admiralty contracts, the builder has performed his engagement when he has delivered the hull complete, with certain hull fittings or fixtures for the attachment of the rigging, and all inside fixtures; but that all other things, including masts, yards, rigging, sails, boats, anchors, cables, cabin furniture, and all movable things of every description necessary to complete the fitting and sea-going equipment and provisioning of the ship, are provided by the Admiralty out of the government stores or warehouses in the dockyards. But the Court will look at the whole of the contract, and gather from it the intention of the contracting parties: and, when they speak of the practice of the Admiralty, they must be understood to mean that the vessel is to be equipped as an English vessel of war of her class is usually
*192] equipped,—that is, with all things *necessary to enable her to take the sea as a ship of war, armament, furniture, and *consumable* stores excepted. [WILLIAMS, J.—The words are "equipped in manner similar in all respects to that which is *practised* with ships or vessels of the same class in Her Majesty's navy under contracts with the Admiralty,"—not "*contracted*."] A fair and liberal construction must be put upon the language employed. The spare masts, &c., charged for in account C. all come within this category. The certificate of Admiral Sartorius, that the vessel was finished to his satisfaction, was given upon the assumption that these things were all within the contract.

The contract is under seal, giving Admiral Sartorius certain limited and defined powers. It expressly provides that "the said purchase-money or sum of 10,400*l.* is inclusive of all charges for the said ship or vessel finished and fitted perfectly in every respect; and no charges shall be demanded for extras; but any addition or additions which may be made *by order in writing* of the said Sir G. Sartorius as an extra or extras shall be paid for *at a price to be previously agreed upon in writing*." Now, the extras and additions comprised in accounts A. and B. were not furnished in pursuance of any written orders, nor were any prices previously agreed upon in respect of them. If the plaintiff has any right of action at all, it must be under this contract: and he ought to have declared upon it specially; and then he must have averred that this condition precedent was duly performed. Upon a traverse of that averment the defendant must have succeeded: and the plaintiff ought not to be in a better position because he has adopted a wrong course of pleading. In Lamprell *v.* The Billericay Union, 3 Exch. 283,† by agreement under seal between the plaintiff
*193] of the one part, and the defendants, guardians *of the poor, of the other part,—after reciting (inter alia) that the plaintiff had proposed to contract to erect the workhouse at Billericay, and perform all the works particularized in a specification prepared by S. & M. (the architects), for 5500*l.*,—the plaintiff in consideration of the

payments to be made to him, agreed with the defendants that he would, in a workmanlike manner, do all the works mentioned in the specification at the times therein mentioned, and would completely finish the whole by the 24th of June, 1840; and that, if the architects should think proper to make any alterations or additions in the progress of the works, they should give the plaintiff *written instructions for the same signed by them*, and the plaintiff should not be considered as having authority to do such additional works without such written instructions. During the progress of the work, the architects from time to time delivered to the plaintiff certificates in the form of letters, signed by them, and addressed to the clerk of the board of guardians, stating that the board might safely advance ——*l.* to the plaintiff on account of the works executed. Certificates in this form to the amount of 5000*l.* were given; but in fact payments were made by the defendants to the amount of 6300*l.* These payments were made generally in respect of the work actually done, without distinguishing the one description from the other. *No written directions were given by the architects for the additional works*, except that letters were in evidence, signed, some by S. and others by M., in which allusion was incidentally made to some of the additional works in progress, and containing suggestions as to the mode of executing them; and save also, that, long after the works were complete, the architects, on the application of the plaintiff, made a valuation of the additional works, which they *estimated at 3133*l.*, and signed a paper stating that to be the amount of their valuation. The Court of Exchequer held that the deed, in requiring written directions, meant written directions *before the additional works should be done;* and that the certificates, letters, and final valuation of the architects did not amount to such directions; and that, although the defendants had accepted the additional works, the plaintiff was not entitled to be paid on a quantum meruit, for that the defendants, being a corporation, were incapable of making a new contract of that description. So, in Milner *v.* Field, 5 Exch. 829,† where a building agreement between the plaintiff and defendant contained a proviso that no instalment should be paid unless the plaintiff delivered to the defendant a certificate, signed by the surveyor of the defendant, that the works were performed according to the specification,—it was held that the want of a certificate was a good defence under the general issue to an action for the instalments; and that the plaintiff was not at liberty to prove that it was withheld by collusion with the defendant. Neither will a Court of equity relieve the party from the condition that the order shall be given as stipulated, in writing. Thus, in Kirk *v.* The Bromley Union, 17 Law J., Ch. 127, in a building contract entered into with the guardians of the poor of a union, a clause was inserted, that deviations or additions might be required, but were not to be paid for unless ordered in writing. Additional work had been done with the knowledge of the guardians, but without any other orders than verbal directions of the architect. The guardians having refused to pay for these extra works, and a bill being filed to ascertain and recover the balance due to the builder, a general demurrer for want of equity was allowed by Lord Cottenham,—reversing the decision of Vice-Chancellor Shadwell.

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*195] *Again, in Scott *v.* The Corporation of Liverpool, 28 Law J., Ch. 230, the plaintiff contracted with the corporation of Liverpool to perform certain works, and the corporation agreed to pay for them in a specified manner,—with a proviso that no sum should be considered due, nor should the plaintiffs make any claim on account of any work executed by them, unless the engineer of the corporation should certify the amount thereof and that the plaintiff was reasonably entitled thereto. The corporation also had the power of determining the contract if the plaintiff should not in the opinion and according to the determination of the engineer exercise due diligence; and thereupon the engineer was to fix the amount earned by the plaintiff. The contract was determined by the corporation, and the plaintiff filed a bill for an account: but it was held,—affirming the decision of Vice-Chancellor Stuart (27 Law J., Ch. 641),—that, the certificate of the engineer not having been given, and not being shown to have been fraudulently withheld, the bill must be dismissed with costs. The Thames Ironworks and Ship-building Company *v.* The Royal Mail Steam-Packet Company, 31 Law J., C. P. 169, is also an important authority upon this part of the case. There, the declaration,—after stating an agreement under seal between the plaintiffs and the defendants, who were a joint-stock company, by which the plaintiffs agreed to build a ship for the defendants for a stipulated sum, and by which it was provided that no alterations should be made in the building of the ship unless on the authority of a letter signed by the secretary of the defendant's company, stating that the directors had directed such alterations,—alleged that during the progress of the works the defendants required alterations to be made in the building

*196] of the ship, which the plaintiffs accordingly made, and that *the defendants discharged the plaintiffs from the said stipulation in the agreement as to requiring the authority of such letter signed by the secretary; and assigned for breach the non-payment of the cost of such alterations. The defendants pleaded that such discharge was not a discharge by deed. The plaintiffs replied, on equitable grounds, that the defendants *by parol* directed the plaintiffs to make the alterations, and that the plaintiffs, at the request of the defendants, made such alterations, and that the defendants took the said ship and enjoyed the benefit of the said alterations, and that, by reason of the premises, the plaintiffs were in equity discharged by the defendants from the said stipulation, and the defendants ought not in equity to be allowed to set up the want of a discharge by deed in bar to the plaintiff's claim for the cost of the said alterations: and this Court held that the replication was bad, as contradicting the declaration, and showing that the plaintiffs had no legal right, but, if any, only an equitable one. And this is an answer which goes to the whole of the plaintiff's claim.

Then, as to the penalties,—the contract provides, that, if the plaintiff should not launch and deliver the vessel at the time and place and in manner aforesaid, fitted and completed in manner aforesaid, he should pay to the defendant 5*l.* for each day thereafter that the ship should not be delivered finished, fitted, and completed as aforesaid, as and for ascertained and liquidated damages, to be recovered by action or deducted from the contract price. In Holme *v.* Guppy, 3 M. & W.

387,† the defendants prevented the plaintiffs from commencing the work at the time specified. Here, however, no delay was caused by any act of the defendant, or by any act of any person by whose acts the defendant is bound. For any unauthorized interference *of Admiral Sartorius, the defendant is not responsible. The [*197 plaintiff is bound by his contract, which defines precisely the duties and the authority of the Admiral. That clearly distinguishes this case from Holme *v.* Guppy, and from all the other cases on that subject. Kirk *v.* The Bromley Union and Scott *v.* The Corporation of Liverpool are also authorities to show that equity will not relieve parties from penalties under such circumstances.

ERLE, C. J.—This case resolves itself into three substantial questions,—one relating to the work and materials supplied by Mr. Scott Russell under the contract for the building of the ship, and whilst the contract was in the course of performance,—another in respect of what I shall call warlike equipment, and which under the circumstances may be considered as having been supplied after the vessel was completed and delivered,—and the third for work done and articles supplied by Mr. Scott Russell after the contract had been entirely performed by him and the ship actually delivered to and received by the defendant.

Now, with respect to such articles as were supplied after the contract was fully completed, it appears to me that they are entirely severed from the contract, and from any restriction contained in it, and that those who were authorized to act on the part of the Portuguese government are subject to the ordinary implications of the law, and must pay for those articles so much as they are worth. This applies to the small item of 116*l.* 8*s.* included in account C., and that claim I think must be allowed.

Then, as to the claim for what I call the warlike stores. By the contract the ship was to be built in a good, substantial, and workmanlike manner, and with good and sound materials of all kinds as prescribed by *Table A. of Lloyds' registry for ships of A. 1, 13 years, [*198 for the price of 10,400*l.*, such price or sum to be inclusive of all charges of every description except as thereinafter mentioned. She was to be delivered by the builder at Millwall on or before the 25th of April, 1859, to the order of Admiral Sartorius, ready for sea, finished, fitted, found, and equipped in manner similar in all respects to that which is practised with ships or vessels of the same class in Her Majesty's navy under contracts with the Admiralty, except machinery, armament, furniture, stores, plate, linen, glass, crockery, and opticians' instruments (other than ship's compasses and azimuth, which Mr. Russell was to supply). The ship was duly completed and ready for sea in every respect; but without certain stores, spare gear, and duplicate sails, &c., which, according to the practice of the Admiralty, are put on board Her Majesty's ships of war when intended for active service, but which are not required in the mercantile marine, nor by any regulations of Lloyds'. The question upon this part of the case is, whether Mr. Scott Russell was bound by his contract to furnish these things. It seems to me that he was not. I think it is extremely probable that the Portuguese government expected to have a vessel of war fitted and found in all respects similar to the practice of Her Majesty's navy with vessels of her class. But I am not at liberty to

conjecture what was the expectation of one of the parties. I can only look at the contract they have entered into: and, looking at that, I find nothing to warrant such a construction. It appears that a great quantity of extra stores, spare masts and yards, duplicate sails, &c., to meet the contingencies of war, but which in ordinary peaceful service are never thought of or required, are usually supplied to ships in Her Majesty's navy on active service in time of war. It
*199] appears from the *case, that, with respect to vessels built for Her Majesty's navy by private ship-builders under contract with the Admiralty, the invariable course of proceeding has been for the ship-builder to enter into a contract with the Admiralty to build the hull according to a specification by which the ship-builder agrees to build and deliver the hull complete with certain hull fittings or fixtures for the attachment of the rigging, and all inside fixtures; but all other things, including masts, yards, rigging, sails, boats, anchors, cables, cabinfurniture, and all movable things of every description necessary to complete the fitting and sea-going equipment and provisioning of the ship, are provided by the Admiralty out of the government stores or warehouses in the dockyards: and no instance was proved of a contract by a private ship-builder with the Admiralty binding the former to build a ship for Her Majesty's navy in accordance with Lloyds' rules or tables, or to fit, find, or equip a vessel ready for sea. "Stores" is an ambiguous word. But, according to the terms of this contract, I do not think Mr. Scott Russell bound himself to turn out the ship so fitted as to be prepared to meet an enemy; and therefore the demand of the defendant, on behalf of the Portuguese government, to have those warlike supplies, was a demand which Mr. Russell was not bound by the terms of his contract to comply with. Reliance is placed, on the part of the defendant, upon a subsequent clause in the contract, by which it is expressly agreed and declared between the parties, "that the said purchase-money or sum of 10,400*l.* is inclusive of all charges for the ship or vessel finished and fitted perfectly in every respect; and no charges shall be demanded for extras, but any addition or additions which may be made by order in writing of Sir G. Sartorius as an extra or extras,
*200] shall be paid for at a price to be previously *agreed upon in writing." Now, as to these warlike stores, is Mr. Scott Russell precluded by this clause from claiming them? These articles were supplied on board the ship when she was nearly completed, and when, as between these parties, she must be taken to have been delivered complete; because Sir G. Sartorius claimed to have them, and Mr. Scott Russell denied his liability under the contract to furnish them. I think Mr. Scott Russell's right to deny his liability is clear, and that it is equally clear that the construction put upon the contract by Sir G. Sartorius was erroneous. But for the letter of the highly respectable agent of Sir G. Sartorius, Mr. Theobald, of the 30th of July, 1859, Mr. Scott Russell would have stood upon his rights. Yielding, however, to the suggestion contained in that letter, that, with a view to prevent unnecessary delay, all the articles supplied by our Admiralty to ships of the same class as the Donna Anna Maria under the Admiralty warrants should be supplied by him, without prejudice to the question whether they

were to be supplied by him under the contract at his cost or not,—Mr. Scott Russell furnished them at the cost of about 2000*l.*, which he now claims to recover. I think the articles thus supplied on the faith of that statement were supplied under a distinct and independent contract; and the defendant, having accepted and used them, must pay for them. There is much to be said in favour of these things falling within the exception in the contract. But the broad and main ground upon which I rest my judgment on this part of the case is, that they are independent of the contract, and therefore that the claim of the plaintiff for this 2000*l.* cannot be repudiated by the defendant.

I now come to the question which arises upon the extra work and alterations done to order. It almost invariably happens, that, in the course of the construction *of a house or a ship or other [*201 extensive work, the party for whom the work is done from time to time desires to have additions and alterations; and it is by no means an unusual thing to insert a clause providing that the employer shall not be liable for extras or additions unless there be an order in writing fixing the price, or the certificate of an architect for the work so done. In many cases, the court, though satisfied that the builder, acting upon the faith of an oral request, has fairly done the work for which he seeks to be paid, has felt itself to be fettered by the express terms of the bargain the parties have entered into. We cannot yield to suggestions of hardship on the one side or the other, though I must confess, that, according to my experience, the hardship has most commonly been upon the side of the employer. By the terms of this contract, the 10,400*l.* is inclusive of all charges for the ship, finished and fitted perfectly in every respect; and no charges are to be demanded for extras: but any addition or additions which may be made *by an order in writing of Sir George Sartorius* as an extra or extras are to be paid for at a price to be previously agreed upon in writing. No additions were ordered by the Admiral in writing: but, during the progress of the work, orders were from time to time given by persons who represented the Portuguese government, for additions and alterations for which under ordinary circumstances Mr. Scott Russell might well suppose he was to be at liberty to charge. He might have declined to comply with these requests unless they were made in writing. I feel bound to give effect to the terms of the contract, and to hold that the extras and additions supplied not under written orders during the performance of the contract form part of the contract for the construction of the ship, and are not to be paid for by the defendant.

*I do not think that any of the cases which have been cited [*202 have any very strong bearing upon this, except that of The Thames Ironworks and Ship-building Company *v.* The Royal Mail Steam-Navigation Company, 31 Law J., C. P. 265. That case certainly bears a very strong analogy to the case in hand. Lamprell *v.* The Billericay Union, 18 Law J., Exch. 282, was rather to the effect that a corporation cannot make a contract so as to make itself liable in assumpsit. Kirk *v.* The Bromley Union, 17 Law J., Ch. 127, and Scott *v.* The Corporation of Liverpool, 28 Law J., Ch. 230, stand entirely upon the same principle. In the last-mentioned case the plaintiff did certain work for the corporation of Liverpool under a contract by which it was stipulated that he was to be paid only upon a certificate

of approval by Mr. Hawkesley; and, as Mr. Hawkesley never did approve of the work, it was held that the plaintiff was not entitled to recover. So, here, such extras and additions only were to be paid for as should be ordered by writing under the hand of Admiral Sartorius, at a price to be ascertained at the time. Upon the whole, therefore, I am of opinion that Mr. Scott Russell cannot enforce in a court of law his claim for extras and additions supplied during the time the ship was in the course of construction.

On the part of the defendant, an attempt has been made to set off against any demand which Mr. Scott Russell might be able to substantiate against him a claim for penalties incurred under the clause in the contract which provides, that, if the vessel should not be launched and delivered at the stipulated time fitted and completed as agreed, the plaintiff should forfeit 5*l.* per day by way of liquidated damages. Now, the vessel was not delivered until a very considerable
*203] time after the day mentioned in the contract. But it is *found by the arbitrator that the extra time required for the execution of the work comprised in the accounts A. and B. caused a delay in the whole of about six weeks in the progress of the ship-building. The days consumed by this delay so occasioned by the requirements of the defendant and those employed by him, do not come within the penalty clause, which contains a proviso, that, "if the said ship or vessel shall not be launched and delivered by Mr. Scott Russell at the time thereinbefore appointed for the launching and delivery thereof, by reason of any cause not under the control of the said John Scott Russell,—the same to be proved to the satisfaction of the said Sir G. Sartorius, and to be certified by him in writing,—then the said penalty shall not be enforced for such number of days, or for such a time as the said Sir G. Sartorius shall in such certificate name." It turns out that those who were the agents representing the Portuguese government caused a delay of six weeks in the finishing of the vessel. Now, the case of Holme *v.* Guppy, 3 M. & W. 387,† decides, that, where a contractor undertakes, under pain of a certain penalty or forfeiture, to perform a work within a given time, and the performance within the time is prevented by the act of the party with whom he contracts, the contractor is exonerated from the penalties.

Upon the whole, therefore, I am of opinion that Mr. Scott Russell's claim in respect of the alterations and additions made in the course of the construction of the vessel, and for which no orders in writing were given, fails; but that he is entitled to recover for the articles furnished after her completion, which for the reasons I have given were not within the contract; and that the defendant's claim in respect of the penalties must be disallowed.

*204] BYLES, J.—I am of the same opinion. This case is *one of very great importance, not only with reference to the magnitude of the sum in dispute, but also with regard to the principles of law which are involved in it. It has been contended by Mr. *Collier* that the Portuguese government were entitled to have this ship of war found and equipped as if she were going on active service. It seems to me that that is not within the contract. By the contract it is stipulated that the vessel shall be "ready for sea, finished, fitted, found, and equipped in manner similar in all respects to that which is

practised with ships or vessels of the same class in Her Majesty's navy under contracts with the Admiralty:" and then comes an exception,—"except machinery, armament, furniture, stores," &c. The contract further provides that the vessel shall be built and constructed with the best materials of all kinds and as prescribed by Table A. of Lloyds' register of ships of the class A. 1, 13 years. All that has been done; and a great deal more has been done, to the extent, I believe, of about 2000*l.* in supplying what my Lord has called warlike stores. As to that part of the plaintiff's claim, it seems to me that there is no defence. I think that additional equipment is altogether dehors the contract; especially when the exception is looked at. These things are not in any sense extras or additions to the contract they are something which the contract does not provide for at all. It may be said that this is a very fine distinction. But put this case,—suppose a man contracts to build a house, with a stipulation that no charge shall be made for extras or additions save such as are certified for under the hand of the architect or surveyor employed to superintend the work; and the contractor, under a verbal order, supplies household furniture and tenants' fixtures: these would not be extras or additions to the contract, but something altogether dehors the *contract. So here, I think, that everything that was beyond [*205 the equipment usually supplied to the Admiralty under contracts with private builders, and beyond what was required for the classification of the vessel as A. 1, 13 years, is dehors this contract, and that the plaintiff is entitled to recover to that extent. I entirely agree in what my Lord has said as to the work done and materials supplied after the vessel was launched and delivered: and it can make no difference in principle whether it was done one day or twenty years after the delivery and acceptance of the vessel. I must own I felt very much disposed to escape, if possible, from Mr. *Collier's* argument with respect to the articles supplied and work done without orders in writing: but I think the cases he has referred to are too strong to be got over,—especially that of Scott *v.* The Corporation of Liverpool, 28 Law J., Ch. 230, which is substantially the same as this case. It is a salutary rule, and ought not to be broken in upon. The contractor has no right to complain if he loses the price of extras and additions which, in disregard of the stipulation he has entered into, he furnishes without getting a written authority. The only remaining question is as to the penalties which the defendant seeks to set off. Holme *v.* Guppy, 3 Exch. 387,† is substantially in point, though here the contract is under seal, and there not. It is founded upon an old and well-understood rule of law. The authorities will be found collected in Comyns's Digest, *Condition* (L. 6). Where the condition has become impossible of performance by the act of the grantee himself, the grantor is excused. So that Holme *v.* Guppy is not only in point, but it is consistent with the ancient authorities, and is founded on the most invincible reason and good sense. The result is that the plaintiff is entitled to recover in respect of the equipment and stores *required to fit the vessel as a vessel of war on active service, [*206 and also in respect of those articles and that work which were supplied after the vessel was completed according to the contract and launched and delivered; but that he is not entitled to recover in

respect of the extras and additions furnished during the performance of the contract without written orders; and that the defendant is not entitled to any set-off in respect of the penalties, the non-delivery of the vessel by the day stipulated having been in part caused by delay for which he himself was responsible.

KEATING, J.—I entirely concur with my Lord and my Brother Byles; and, after the judgments delivered by them, I think it necessary only to advert to one single point, viz.: with reference to the claim of Mr. Scott Russell for the price of those articles which were supplied for the purpose of equipping the ship as a vessel of war, and beyond what would be required for her classification at Lloyds' as an A. 1 ship for 13 years. Mr. *Collier* has argued with very great force that these must be considered as being in the same category as the extras so far as to require the order for them to be in writing to bind the defendant. My Lord has, however, pointed out that they are rather to be classed with works done and articles supplied after the completion and delivery of the ship: and to this opinion I incline; for, though true it is that the case states that Mr. Theobald's letter of the 30th of July, 1859, was written when the ship was *nearly* completed, yet, when we come to look at the nature of the things supplied upon the faith of that letter, it is clear that they must have been supplied after the completion so as to entitle the ship to the stipulated classification in Lloyds' register. I merely make this remark with a view of fortifying the observations made by my Lord, and *in which I fully concur, that, looking to the whole of the facts, this large item may fairly be placed in the category of goods supplied after the completion of the ship according to the contract. I do not feel it to be necessary to add anything upon the other points, which have been so fully considered by the rest of the Court. Judgment for the plaintiff accordingly.

*207]

THE BRISTOL AND EXETER RAILWAY COMPANY, Appellants; WILLIAM TUCKER and WILLIAM SAY, Respondents. *Nov.* 19.

The 1st section of the Clevedon Junction Railway Act, 8 & 9 Vict. c. clv., which enacts that "so much of the Railways Clauses Consolidation Act, 1845, as relates to the mode of crossing roads and construction of bridges, shall respectively, except so far as the same may be by this act otherwise provided for, and except such of the provisions thereof as may be inconsistent with the provisions herein contained, be incorporated and form part of this act," incorporates not only all the provisions of the general act which regulate the crossing of turnpike roads by the railway and the construction of railway bridges, together with the 65th section, which imposes penalties for suffering the roads and approaches to the bridges to be out of repair, but also the 145th and subsequent sections, which relate to the mode of enforcing such penalties.

THIS was a case stated by justices of the peace for the county of Somerset for the opinion of the Court of Common Pleas pursuant to the 20 & 21 Vict. c. 43:—

In the session 8 & 9 of the Queen, an act (c. clv.) was passed for making (amongst other purposes) a branch railway from The Bristol and Exeter Railway at Yatton, to Clevedon, in the county of Somer-

set; which act received the Royal assent on the 31st of July, 1845. By the 1st section of this Act, it was enacted "that the Lands Clauses Consolidation Act, 1845, and so much of the Railways Clauses Consolidation Act, 1845, as relates to the construction of railways the temporary use of lands during the construction of railways, to the taking of lands for additional stations, to the mode of *crossing of roads and construction of bridges, to the construction of [*208 arches, &c., shall respectively, except so far as the same may be by this Act otherwise provided for, and except such of the provisions thereof as may be inconsistent with the provisions herein contained, be incorporated with and form part of this Act."

The branch railway from Yatton to Clevedon was made soon after the passing of the act; and, in passing through the tything of Yatton West, four highways were (amongst others) interfered with and carried over the branch railway by a bridge, the roads being altered considerably from their original level, and one, if not more of them, being diverted for some distance.

In January last, this bridge and the approaches thereto being out of repair, William Tucker and William Say, two householders of the said tything, made application to the justices acting within and for the petty-sessional division of Long Ashton, in the said county, within which petty-sessional division the tything of Yatton West is situated, complaining thereof: and on the 18th of January, the case came before the bench at Long Ashton,—the railway company having been summoned for such purpose, and appearing through their solicitor; when an order was made by the magistrates then sitting, founded on the 50th and 65th sections of the Railways Clauses Consolidation Act, 1845, then alleged on the part of the complainants to be respectively portions of the said act so incorporated as aforesaid, and of which order the following is a copy:—

"Somerset, } Be it remembered, that, on the 16th of January,
to wit. } 1861, complaint was made before Edmund Joseph Daubeny, Esq., one of Her Majesty's justices of the peace in and for the said county of Somerset, by William Tucker and William Say, two householders of the tything of Yatton West, in the parish of Yatton, in the said county (which said *tything is wholly situate within the petty-sessional division of Long Ashton, in [*209 the said county), for that the Bristol and Exeter Railway Company had neglected to maintain and keep in repair a certain bridge situate in the said tything, called the Kingston Road Bridge (together with the immediate approaches and fences connected therewith), which said bridge, together with the said immediate approaches and fences, had been constructed by the said Bristol and Exeter Railway Company over the Clevedon branch of the said Bristol and Exeter Railway for the purpose of carrying four public highways, to wit, the several roads from Kingston Seymour to Yatton and Clevedon, and vice versâ, and a certain public highway called Young's Road over the said Clevedon branch railway; and that the said several immediate approaches to the said bridge and the fences connected therewith were then out of repair; and that the said railway company were bound to put the same into complete repair:

"Now, at this day, to wit, on the 18th of January, 1861, at Long

Ashton aforesaid, the parties aforesaid appear before us, &c., &c., two of Her Majesty's justices of peace in and for the said county; and the said William Tucker and William Say, being two householders of the tything of Yatton West as aforesaid, within which said district the said bridge with the said several immediate approaches and fences connected therewith is situate, make application to us the said justices complaining that the said several immediate approaches to the said Kingston Road Bridge by which the said public highways cross the said Clevedon branch railway are founderous, full of ruts, and greatly out of repair, and that the fences on the sides of the said approaches, and being necessary works connected with the said bridge, are
*210] broken down and out of *repair,—which said several immediate approaches and the said fences, having been so constructed and executed as aforesaid by the said Bristol and Exeter Railway Company, which said company were required by the statutes in such case made and provided to maintain and keep in repair; and it is proved on oath to us that the said William Tucker and William Say had ten days and upwards previously to their making such complaint, to wit, on the 20th of December now last past, given notice to the said Bristol and Exeter Railway Company that the said several immediate approaches to the said bridge, together with the said fences, were out of repair as aforesaid, and by the said notice required the said company to put, maintain, and keep in repair the said immediate approaches and fences, and informed the said company, that, in default of their so doing within ten days from the service of such notice, it was the intention of the said William Tucker and William Say to make application to two of Her Majesty's justices of the peace for the said county for an order commanding the said company to put the said immediate approaches and fences into complete repair: And now, having heard the matter of the said complaint and of the said application of the said William Tucker and William Say, and the defence of the said Bristol and Exeter Railway Company, and it appearing to us that the said Bristol and Exeter Railway Company is liable to maintain and keep in repair the said bridge and the said several immediate approaches and fences connected therewith, being so as aforesaid out of repair, we do order and adjudge the said Bristol and Exeter Railway Company to put the said several immediate approaches to the said bridge, and the said fences on the respective sides thereof and connected therewith, into complete repair
*211] within a period of three weeks from the *date of this order. Given under our hands and seals, &c."

No appeal was made against this order; nor were any proceedings taken to contest its validity.

This order being disobeyed by the company, on the 26th of July last the company was summoned before the justices of the said county sitting at petty sessions in and for the said petty-sessional division of Long Ashton, in the said county, on the information of William Tucker and William Say, two householders of the tything of Yatton West in the petty-sessional division of Long Ashton,—for that they the said company had failed to comply with a certain order under the hands and seals of, &c., &c., two of Her Majesty's justices of the peace for the said county, bearing date the 18th of January now last past, whereby, in pursuance of the statute in that case made and provided,

the said justices did order and adjudge them within three weeks from the date of their said order to put into complete repair the several immediate approaches to a certain bridge situate in the said tything, for carrying certain public highways over the Clevedon branch of the said railway, and called the Kingston Road Bridge, and the fences on the sides of such approaches and connected therewith.

The company were represented by their solicitor. After proof of the service of a copy of the order, with production of the original at the same time, on the secretary of the company, on the 4th of February, the magistrates, on examining witnesses, found it proved that the said approaches and fences had not been repaired in pursuance of the said order.

It was objected on the part of the appellants (the railway company), that the 56th section of The Railways Clauses Consolidation Act, 1845 (under which, taken in connection with the 50th section of the same *act, the proceedings were taken for a penalty) did not apply to them, as not being incorporated in their act. This objection [*212 the magistrates, after hearing arguments on both sides, overruled.

It was also objected that the 145th section of The Railways Clauses Consolidation Act, 1845, under which the recovery of penalties is provided for, was not incorporated with and did not form part of the appellants' act.

This objection was also overruled; and the magistrates convicted the appellants in the penalty of 100*l.* (for twenty days during which the appellants had failed to comply with the order) and costs; and they directed 50*l.* to be applied towards the repair of the approaches and fences to the said bridge, and one moiety of the residue to be paid to the informers, and the other moiety to the overseers of the poor of the parish of Yatton.

The Company, being dissatisfied with this decision, demanded a case under the provisions of the statute 20 & 21 Vict. c. 43.

The questions for the opinion of the court were,—first, whether the local Act does by the words "the mode of crossing of roads and construction of bridges," or by any other means, incorporate the 65th section of The Railways Clauses Consolidation Act, 1845,—secondly, whether, in the event of the court holding that the 65th section of The Railways Clauses Consolidation Act, 1845, is so incorporated with the local Act, the 145th and subsequent sections providing the method of recovering penalties, and their application, are also incorporated.

If the Court shall be of opinion that the 65th section of The Railways Clauses Consolidation Act, 1845, is so incorporated, then the conviction to be confirmed; otherwise, to be quashed,—the second *question only relating to the mode of enforcing such conviction. [*213

Kinglake, Serjt. (with whom was *M. Smith*, Q. C.), for the appellants.—The question is whether the 65th section of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20) is incorporated in the special Act for (amongst other things) the formation of the Cleveland Junction, 8 & 9 Vict. c. clv. The 1st section of the Railways Clauses Consolidation Act, 1845, after reciting that "it is expedient to comprise in one general Act sundry provisions usually introduced into Acts of

Parliament authorizing the construction of railways, and that as well for the purpose of avoiding the neccessity of repeating such provisions in each of the several Acts relating to such undertakings, as for insuring greater uniformity in the provisions themselves," enacts that "this Act shall apply to every railway which shall by any Act which shall hereafter be passed be authorized to be constructed, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, *save so far as they shall be expressly varied or excepted by any such Act*, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act." Section 5 enacts, that, for the purpose of incorporating a portion only of the provisions of that Act, "it shall be sufficient in any such (special) Act to enact that the clauses of this Act with respect to the matter so proposed to be incorporated (describing such matter as it is described in this Act in the words introductory to the enactment with respect to such matter)
*214] shall be *incorporated with such Act, and thereupon all the clauses and provisions of this Act with respect to the matter so incorporated, shall, save so far as they shall be expressly varied or excepted by such Act, form part of such Act, and such Act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such Act shall relate." The 45th section (without any special heading) empowers the company to take land for the purpose, amongst others, "of making convenient roads or ways to the railways." Then comes a special heading, "And with respect to the crossing of roads or other interference therewith, be it enacted as follows." Then follow a great number of provisions,—s. 46, for the carrying a turnpike-road over the railway, or vice versâ,—ss. 47, 48, for the crossing of roads on a level,—ss. 49, 50, and 51, for the construction of bridges over the road or the railway,—and other sections specially applying to the interference with roads. And then comes the section (s. 65) upon which this order was made,—"Where, under the provisions of this or the special Act, or any Act incorporated therewith, the company are required to maintain or keep in repair any bridge, fence, approach, gate, or other work executed by them, it shall be lawful for two justices, on the application of the surveyor of roads, or of any two householders of the parish or district where such work may be situate, complaining that any such work is out of repair, after not less than ten days' notice to the Company, to order the Company to put such work into complete repair within a period to be limited for that purpose by such justices; and, if the Company fail to comply with such order, they shall forfeit 5*l.* for every day that they fail so to do: and it shall be lawful for the justices by whom any such penalty is
*215] imposed to order the whole or any portion *thereof to be applied in such manner and by such persons as they think fit, in putting such work into repair." The Court of Queen's Bench, in The North Staffordshire Railway Company *v.* Dale, 8 Ellis & B. 836 (E. C. L. R. vol. 92), and the Court of Exchequer, in the Newcastle Turnpike-Roads Trustees *v.* The North Staffordshire Railway Company, 5 Exch.

160,† held that the railway Company were, under the 46th section of the general Act, and without reference to the special Act, bound to repair and maintain the approaches to a bridge built by them under the Act. The 6 & 7 W. 4, c. xxxvi., under which this Company's main line was constructed, contains provisions for the crossing of roads providing for every obligation which the legislature thought it necessary to impose upon them, but not requiring them to maintain or repair the roads and approaches. That being the position of the Company, the special Act now in question was passed in the same session as the general Act; and there is no reason why any further or different liability should be cast upon the Company than they lay under before. The 1st section of the special Act provides that "so much of the Railways Clauses Consolidation Act, 1845, as relates to the construction of railways, the temporary use of lands during the construction of railways, to the taking of lands for additional stations, to *the mode of crossing of roads and construction of bridges*, &c., shall, except so far as the same may be by this Act otherwise provided for, and except such of the provisions thereof as may be inconsistent with the provisions herein contained, be incorporated with and form part of this Act." Do these words cast any new or additional liability upon the Company? The 145th section,—which comes after a special heading "And with respect to the recovery of damages not specially provided for, and of penalties," &c.,—provides that "every penalty or forfeiture imposed by this or the special Act, or by any by-law made in pursuance *thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices." It is submitted that these penalty clauses in the general Act are not incorporated in the special Act, and consequently that the conviction was wrong. [*216

Welsby, for the respondents.—The 1st section of the special Act clearly incorporates the 65th section of the Railways Clauses Consolidation Act, 1845, and also the 145th and subsequent sections which relate to the mode of enforcing the penalties. The words are general,—"So much of the Railways Clauses Consolidation Act, 1845, as relates to the mode of crossing roads and construction of bridges, shall respectively, except so far as the same may be by this Act otherwise provided for, and except such of the provisions thereof as may be inconsistent with the provisions herein contained, be incorporated with and form part of this Act." It would be absurd to hold that the clause imposing the penalty is incorporated, but that those clauses which relate to the mode of enforcing it are not. The special Act makes no provision that is inconsistent with this construction.

ERLE, C. J.—This case seems to me to be a very clear one. By The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 46, it is enacted, that, if the line of a railway cross any turnpike-road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge; and "such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the *company." If the company neglect this duty, they are liable to be proceeded against under [*217

s. 65 before two justices, who may order them to put the work in repair within a given time, under pain of forfeiting 5*l.* for each day that they shall refuse to do so. And by s. 145, this penalty may be enforced by summary proceeding before two justices. The special Act for the branch railway in question passed in the same session; and the question raised before us is, whether it incorporates all these provisions of the general Act. I am of opinion that it does. The general Act is divided into what may be called several heads or chapters. The fifth section, which points out a mode of incorporating the provisions, recites that "it may be convenient in some cases to incorporate with Acts hereafter to be passed some portion only of the provisions of this Act," and it proceeds to enact, that, "for the purpose of making any such incorporation, it shall be sufficient in any such Act to enact that the clauses of this Act with respect to the matter so proposed to be incorporated (describing such matter as it is described in this Act, *in the words introductory to the enactment with respect to such matter*) shall be incorporated with such Act; and thereupon all the clauses and provisions of this Act with respect to the matter so incorporated shall, save so far as they shall be expressly varied or excepted by such Act, form part of such Act; and such Act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such Act shall relate." The 1st section of the special Act (8 & 9 Vict. c. clv.) enacts that "so much of the Railways Clauses Consolidation Act, 1845, as relates to the construction of railways, &c., *to the mode of crossing roads and construction of bridges*, &c., shall respectively, except so far as the same may be by this Act otherwise provided

*218] *for, and except such of the provisions thereof as may be inconsistent with the provisions herein contained, be incorporated with and form part of this Act." It seems to me that this necessarily incorporates the 46th and subsequent sections as to the crossing of turnpike-roads. The company must cross the road by means of a bridge, and they must erect and maintain the bridge with the approaches. It is impossible that the legislature, in passing the special Act, should have intended to adopt the one part of that provision and not the other. Then, did they intend to incorporate the 65th section of the general Act which empowers the justices to impose a penalty for a neglect of that duty? It seems to me that they did. It would be utterly nugatory to incorporate the clauses which oblige the company to make and maintain a bridge, and not to incorporate that whereby alone they can be compelled to perform that duty. The 65th section gives an inchoate remedy: the justices may order the company to put the bridge and approaches into complete repair within a certain time, and may impose upon them a fine of 5*l.* per day for neglect of such repair: and s. 145 gives the mode of enforcing that penalty. I therefore think the clauses imposing the duty and those which point out the manner of enforcing its performance are all incorporated into the special Act.

WILLIAMS, J.—I am of the same opinion. The special Act incorporates so much of the Railways Clauses Consolidation Act, 1845, as relates to the crossing of roads. The language employed in s. 1 embraces the whole of the legislation as it so far relates "to the mode of

crossing of roads and construction of bridges:" and the consequences which are necessarily incident must follow the adoption of the prescribed mode. If *the special Act incorporates all the provisions as to the mode of crossing roads and constructing [*219 bridges in the general Act, of necessity it must also incorporate those clauses which give the justices the power of enforcing the performance of the duties imposed by those provisions.

BYLES, J.—I also think the special Act incorporates all the provisions of the general Act as to the making and maintaining of bridges crossing roads. It would be a very serious thing if the repair of all the railway bridges in the kingdom were cast upon the public. The county would not be bound to repair this bridge. The statute 22 H. 8, c. 5, only applies to bridges erected over such water as answers the description of flumen vel curses aquæ, which the inhabitants of a county were bound by common law to repair. (a) I should be disposed, if it were necessary, to give the words of incorporation here a very large and liberal interpretation. I should only be repeating what has already been better said by my Lord if I added anything more. The second order of the justices reposes on the first. And both were well made.

KEATING, J.—I am of opinion that the decision of the justices was right as to both points. I entirely concur with the rest of the Court, for the reasons they have given.

Decision affirmed, with costs.

(a) See The King v. The Inhabitants of Oxfordshire, 1 B. & Ad. 289 (E. C. L. R. vol. 20).

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*WILLIAM REED, Appellant; EDWARD WIGGINS, Respondent. *Nov.* 14. [*220

The 166th section of the Bankruptcy and Insolvent Act, 1861, has not a retrospective operation.

Therefore, the repeal of the 202d section of the 12 & 13 Vict. c. 106, by the above-mentioned Act does not make available, even in the hands of a bonâ fide holder for value without notice, a negotiable instrument declared void by the repealed section, where the endorsement was made and the instrument became due after the Act of 1861 came into operation.

THIS was an action brought by the plaintiff as endorsee of a bill of exchange for 36*l.*, against the defendant as acceptor. The action was tried in one of the Middlesex county courts on the 17th of June, 1862, when judgment was given for the plaintiff for the amount of the bill and interest, subject to the opinion of this Court upon the following case:—

On the 8th of November, 1860, the defendant was duly adjudicated a bankrupt, being indebted at the date of such bankruptcy to one William Robert King, in the sum of 256*l.* 3*s.* 6*d.* The said William Robert King proved his debt against the estate of the defendant, and was appointed one of the assignees under the said bankruptcy. The defendant, as a consideration, and *with intent to persuade the said William Robert King to forbear opposing and to consent to the allowance of his certificate*, accepted and delivered (among others) the bill of exchange on which this action is brought to the said William Robert

King on the 12th of April, 1861: and there never was any consideration for his said acceptance, or for the delivery of the said bill of exchange to the said William Robert King, save as aforesaid. The said William Robert King, after the delivery to him (among others) of the said bill of exchange, did consent to the defendant passing his last examination, which took place on the 2d of May, 1861, and to the allowance of his certificate under his said bankruptcy, which certificate was accordingly granted to the bankrupt on the 7th of June, 1861.

The said bill of exchange was drawn and accepted on the 12th of
*221] April, 1861, and was made payable *twelve months after date. It was then endorsed to one Henry Green, who endorsed it to the plaintiff on the 11th of April, 1862, for value, and the plaintiff took it without notice.

The above facts having been proved at the trial, the defendant contended that the bill of exchange was void by reason of the provisions of the Bankrupt Law Consolidation Act, 1849, and that the plaintiff was not entitled to recover; but the Judge held that the proviso in the 166th section of the Bankruptcy Act, 1861, applied to the said bill of exchange, and took it out of the operation of the 202d section of the Bankrupt Law Consolidation Act, 1849: and he gave judgment for the plaintiff for the amount of the said bill.

The question for the opinion of this Court was, whether the said bill was void by reason of the provisions of the Bankrupt Law Consolidation Act, 1849, and whether, upon the above facts, the plaintiff was entitled to recover.

Morgan Lloyd, for the appellant.—At the time the bill in question was given, the statute 12 & 13 Vict. c. 106 was in operation. The 202d section of that statute enacted "that *any* contract or *security* made or *given by any bankrupt* or other person unto or in trust for any creditor, for securing the payment of any money due by such bankrupt at his bankruptcy, *as a consideration or with intent to persuade such creditor to forbear opposing, or to consent to the allowance of the bankrupt's certificate*, or to forbear to petition for the recall of the same, *shall be void*, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give this Act and the special matter in evidence." If that section had stood alone, it is clear that
*222] such a security would be *absolutely void even in the hands of a bonâ fide holder for value and without notice. [BYLES, J.—Just as a bill given for a gaming debt, under the 9 Anne, c. 14,(*a*) or upon a usurious consideration before the 58 G. 3, c. 93.(*b*)] Yes. The question, therefore, is, whether by reason of the bill having been endorsed to the respondent after the passing of the Bankruptcy and Insolvency Act, 1861, 24 & 25 Vict. c. 134, it is taken out of the operation of the former enactment. Now, the 166th section of the last-mentioned Act enacts that "any contract, covenant, or security made or given by a bankrupt or other person, with, to, or in trust for any creditor, for securing the payment of any money as a consideration or with intent to persuade the creditor to forbear opposing the

(*a*) See Robinson v. Bland, 1 W. Bl. 262, 2 Burr. 1077.
(*b*) See Lowe v. Walker, 2 Dougl. 736.

order for discharge, or to forbear to petition for a rehearing of or to appeal against the same, shall be void, and any money thereby secured or agreed to be paid shall not be recoverable, and the party sued on any such contract or security may plead in general that the cause of action accrued pending proceedings in bankruptcy, and may give this Act and the special matter in evidence:" and then comes a proviso "that no such security, if a negotiable security, shall be void as against a bonâ holder thereof for value without notice of the consideration for which it was given." And the 167th section enacts, that, "if any creditor of a bankrupt shall obtain any sum of money, or any goods, chattels, or security for money, from any person as an inducement for forbearing to oppose, or for consenting to the allowance of the discharge of such bankrupt, or to forbear to petition for the recall of the same, every such creditor so offending shall forfeit and lose for *every such offence the treble value or amount of such money, goods, chattels, or security so obtained." The [*223 security in question being absolutely void at the time of the passing of the Act of 1861, the subsequent endorsement can give it no efficacy. The new enactment applies only to securities given after it came into operation. Words must be clear to show that a retrospective effect was intended. If there could be any doubt upon the subject, that doubt is removed by the 230th section, which enacts that "the Acts and part of Acts set forth in schedule G. to this Act," —the 202d section of the 12 & 13 Vict. c. 106 being one of them,— "to the extent to which they are therein expressed to be repealed, and all other Acts or parts of Acts which are inconsistent with this Act, are repealed; but such repeal shall not affect any proceeding pending, or any right that has arisen or may arise, or any penalty incurred, or that may be incurred, in respect of any transaction, act, matter, or thing done or existing prior to or at the commencement of this Act, under or by virtue of any of the Acts or parts of Acts repealed." That is an express saving of all rights arising out of prior transactions.

Mellish, Q. C., for the respondent.—The question is whether a bill of exchange given by a bankrupt in violation of the 202d section of the 12 & 13 Vict. c. 106, is void as against a bonâ fide holder for value without notice,—that section having been repealed at the time the bill was endorsed to the holder and when it became due; or whether the 166th section of the 24 & 25 Vict. c. 134 (being the only statute in operation applicable to the bill when it was so endorsed and became due) does not give the bonâ fide holder for value a right to recover. The course of legislation on the subject is singular. The 6 G. 4, c. 16, contained a *clause (s. 125) which was in terms the same as the 202d section of the 12 & 13 Vict. c. 105. But, in [*224 the interim, the attention of the legislature having been called to the hardship of the position of a bonâ fide holder for value without notice, the 5 & 6 W. 4, c. 41, was passed, the first section of which,— after reciting the 16 Car. 2, c. 7, and 7 Ann. c. 14, against gaming, the 12 Ann. st. 2, c. 16, and 58 G. 3, c. 93, against usury, and the abovementioned provision of the 6 G. 4, c. 16, and further reciting that "whereas securities and instruments made void by virtue of the several hereinbefore recited Acts are sometimes endorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable

consideration, without notice of the original consideration for which such securities or instruments were given, and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice,"—enacted "that so much of those Acts as enacts that any note, bill, or mortgage shall be absolutely void, should be and the same was thereby repealed; but, nevertheless, every note, bill, or mortgage which if that Act had not been passed would, by virtue of the said several lastly thereinbefore-mentioned Acts, or any of them, have been absolutely void, should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration, and the said several Acts should have the same force and effect which they would respectively have had, if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such Acts had respectively provided that every such note, bill, or mortgage should be deemed or taken to have been made, drawn, accepted, given, or executed for an illegal consideration." When they came to pass the *225] Bankrupt Law Consolidation Act, 1849, the legislature *appear to have altogether forgotten the 5 & 6 W. 4, c. 41, s. 1, and re-enact the 6 G. 4, c. 16, s. 125, in terms. [WILLIAMS, J.—We had this question before us in a recent case of Goldsmid *v.* Hampton, 5 C. B. N. S. 94, and disposed of it in a way which is unfavourable to your argument.] The only question which remains, is, what is the effect of the 166th and 230th sections of the 24 & 25 Vict. c. 134. It is submitted, that, the endorsement having taken place after the last-mentioned statute came into operation, the case must be determined upon the 166th section; and that there is nothing in the 230th section to take it out of that enactment. [BYLES, J.—The repeal of the former provision is not to affect "any right that has arisen or may arise" thereunder. Does not that include the right of this defendant to resist being made liable upon this bill at the suit of the plaintiff?] The question is, whether the right of the subsequent endorsee is to depend upon the old or the new Act. That is rather a penalty imposed upon the party guilty of the offence. [BYLES, J.—Even that is against you. The section goes on "or any penalty incurred or that may be incurred in respect of any transaction, act, matter, or thing done or existing prior to or at the commencement of this Act" under the repealed Acts.]

PER CURIAM.—There is no room for doubt. The judgment must be for the appellant.

Judgment for the appellant, with costs.

*226] *HUNT *v.* GUNN. *Nov.* 8.

A contract to deliver shares in a joint stock company does not require the actual delivery of scrip certificates, which are the mere indicia of property: but the party contracting to deliver the shares sufficiently performs his engagement when he places the other in the position of being the legal owner of them.

THIS was an action for the alleged breach of an agreement to

deliver to the plaintiff certain shares in a joint-stock company called The London and Lancaster Assurance Company.

The declaration stated an agreement entered into between the plaintiff and the defendant, whereby the former, in consideration of a present payment of 100*l.* and sixty shares in the above Company, to be delivered within one month after complete registration of the Company, or, in the event of the non-delivery of the shares, a further payment of 150*l.*, undertook to give the latter a full discharge from all claims which he had on him in respect of services rendered, &c. Breach, non-delivery of the shares, and non-payment of the 150*l.*

The defendant pleaded,—first, a traverse of the agreement,—secondly, that he did cause to be delivered to the plaintiff and the plaintiff accepted the said sixty shares according to the term of the agreement,—thirdly, a special plea stating in substance that the defendant was entitled to one thousand shares in the Company, that it was agreed between him and the plaintiff that the plaintiff should have sixty of those shares, 2*l.* 10*s.* each paid up, and that he did hand over to the plaintiff such sixty shares, and the plaintiff executed the Company's deed of settlement in respect thereof. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term. It appeared that the defendant had directed that sixty of his shares in the London and Lancashire Assurance Company should be placed in the plaintiff's name; and that the *plaintiff on the 1st of December, 1861, executed the deed of [*227
settlement in respect of those sixty shares; but that the Company was not completely registered until the 1st of February, 1862, the share-register not sealed until the 1st of May,(*a*) and the scrip-certificates not ready for delivery until the 7th of May.

On the part of the plaintiff, it was contended, that, inasmuch as no scrip-certificates for the sixty shares had been delivered to him, the defendant had failed to perform his agreement, and therefore the 150*l.* became payable absolutely.

The Lord Chief Justice, however, ruled that, as the plaintiff had become the holder of sixty shares in the Company by his execution of the deed of settlement from the moment the Company was completely registered, the defendant had done that which was tantamount to a delivery of the shares, and that he was not bound to deliver scrip-certificates, which are the mere indicia of property: and he directed a verdict to be entered for the defendant; reserving leave to the plaintiff to move to enter a verdict for 150*l.*, if the Court should be of opinion that the defendant had been guilty of a breach of his contract.

Hawkins, Q. C., now moved accordingly.—The parties to this contract evidently contemplated something more than the mere execution of the deed of settlement. To complete his part of the contract, the defendant must deliver something. [ERLE, C. J.—The sixty shares were absolutely vested in Hunt from the day on which the Company was completely registered. What more could he have? BYLES, J.—"Shares" do not mean "scrip-certificates," but an interest in the Company. You must not assume that the delivery of *shares [*228
means the delivery of the indicia of property.] The register

(*a*) See The Wolverhampton New Waterworks Company *v.* Hawksford, 7 C. B. N. S. 79 (E. C. L. R. vol. 97); in error, 11 C. B. N. S. 456 (E. C. L. R. vol. 103).

was not sealed until the 2d of May, 1862, and therefore there could be no valid transfer of the shares. The 7th section of the Joint Stock Companies Act, 7 & 8 Vict. c. 110, enacts that it shall not be lawful for any Joint Stock Company to act otherwise than provisionally in accordance with that Act until such Company shall have obtained a certificate of complete registration as thereinafter provided: and s. 26 enacts, that, until a subscriber shall have been duly registered as a shareholder in the registry office, it shall not be lawful for him to dispose, by sale or mortgage, of such share, or any interest therein, and that any contract for or sale or disposal of such share or interest shall be void, and every person entering into such contract shall forfeit a sum not exceeding 10*l*.

WILLIAMS, J.—I am of opinion that the verdict was quite right. The case seems to me to fall within the principle established so long ago as the case of Freshwater *v.* Eaton, 1 Stra. 49. That was a *scire facias* on a recognisance in the Marshal's Court, to surrender the principal to the gaoler of the Palace Court if he should be condemned. Error was brought upon the judgment, and the judgment was affirmed, and the bail thereupon rendered the principal to the King's Bench, the whole proceedings being removed thither. Whitaker, Serjt. insisted that this was no performance of the condition. But the Court held otherwise. Parker, C. J., said: "Upon the surrender *to the* Marshal's Court, non constat to the officer that there is any charge against him there, and by that means he will be discharged: and *if he* be surrendered there, he must be removed to this Court; it will therefore be least trouble to surrender him here." Eyre, J., said:
*229] "'The render ought to be where it will be most effectual." And Pratt, J., added: "A condition to re-enfeoff is performed by lease and release: Co. Litt. 207 a; 1 Rol. Abr. 426; Carter 88; Plowd. 7 a, 156 b. Condition to pay money is performed by causing it to be paid. The intent of the condition in this case is answered by the defendant's being in prison to answer the plaintiff's demand; and many cases of conditions there are where the law has never *required* a strict performance according to the letter of the condition, provided the intent of the condition be answered." Here, the intent of the parties was that the defendant should give the plaintiff the means of becoming a shareholder. The result of the transaction is, that the plaintiff contracted to become and did become a shareholder in the Company. I think there was a complete performance of the contract on the defendant's part. It would be a reproach to the law if it were otherwise.

BYLES, J.—I am of the same opinion. When this agreement was entered into, there were two modes by which the plaintiff might become a shareholder in the Company; by executing the deed, and so becoming an original shareholder, or by becoming a transferree of the shares. He executed the deed as a holder of sixty shares, and so became an original shareholder; and he was afterwards registered as such. The condition of the contract therefore has been satisfied. The only person who could in any way deal with the shares after the execution of the deed of settlement and the complete registration of the Company, is the plaintiff who now sues for the non-performance of the agreement to deliver the shares to him. In the events which

have happened, it seems to me, that, upon the strict construction of the document, as well as *according to the manifest justice of the case, the defendant is entitled to a verdict on the second plea. And, if there be any technical difficulty in the way, it would be the duty of the Court to amend, in order to advance the real justice of the case. [*230

KEATING, J.—I am entirely of the same opinion. The plaintiff in effect says to the defendant, "Although I have got the shares you contracted to deliver to me, yet, as you did not deliver them to me, you have failed to perform your contract." It would be a disgrace to the law if this were to be held not to be a performance. The second plea is fully proved.

ERLE, C. J.—I am clearly of opinion that the shares were *delivered*, if they vested in the plaintiff. To a person who understands anything of the subject, the scrip-certificate is something totally distinct from the shares. The certificate may be delivered though the shares are not, and vice versa. Upon the facts proved here, the shares were clearly vested in Hunt from the moment the Company became a completely registered Company; and that was a delivery within the meaning of this contract. Rule refused.

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*WHITE *v.* STEELE and Another. *Nov.* 30. [*231

The statute 1 W. 4, c. 21, s. 1, which regulates the mode of declaring in prohibition, enacts, that, "in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess *damages*," &c.:—Held, that costs incurred by the plaintiff in prohibition in his defence to the suit in the inferior court, are not recoverable as "damages."

THE plaintiff being sued in the Ecclesiastical Court for refusal to pay a rate levied to defray the expenses attending the purchase of an additional burial-ground for the parish of Plumstead, in the county of Kent, claimed to put in a responsive allegation to the effect that, a poll having been duly demanded at a vestry-meeting of the parish convened to consider the matter, and refused, the parish had never legally expressed its desire to procure a burial-ground under the statute 3 G. 4, c. 72, s. 26, and consequently that the order of the church building commissioners, and all proceedings based upon it, including the rate sought to be enforced, were illegal and void. The judge of the Consistory Court (Dr. Twiss) having rejected this responsive allegation, the now plaintiff appealed to the Court of Arches, which Court confirmed the decision of the Court below.

The plaintiff thereupon moved for a prohibition, to prohibit the Judge of the Court of Arches from further entertaining, and the now defendants (the churchwardens) from further prosecuting the suit. After argument, the Court directed the plaintiff to declare in prohibition. He accordingly did so, and the defendants pleaded several pleas, some of which were demurred to, and judgment given thereon for the plaintiff: vide 12 C. B. N. S. 383 (E. C. L. R. vol. 104).

Issues of fact were also joined, which came on for trial before Martin, B., at the last assizes for the county of Surrey, when (the jury being of opinion, upon the evidence, that a poll had been duly

demanded, and refused), a verdict was found for the plaintiff, damages
*232] 40*s.*,—leave being reserved to him to move to increase *the damages by the sum of 90*l.*, being the amount of the costs which he had been put to by the abortive proceedings in the Ecclesiastical Court.

Shee, Serjt., now moved accordingly.—The plaintiff claims to be entitled to recover as damages the expense he has incurred in defending himself against the proceedings in the Ecclesiastical Courts. His claim is founded upon the 1 W. 4, c. 21, which, after reciting that "the filing a suggestion of record on application for a writ of prohibition is productive of unnecessary expense, and the allegation of contempt in a declaration in prohibition filed before writ issued is an unnecessary form, and that it is expedient to make some better provision for payment of costs in cases of prohibition," in s. 1 enacts "that it shall not be necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only; and, in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not as heretofore on the behalf of the party and of His Majesty, and shall contain and set forth in a concise manner so much only of the proceeding in the Court below as may be necessary to show the ground of the application, without alleging the delivery of a writ or any contempt, and shall include by praying that a writ of prohibition may issue; to which declaration the party defendant may demur or plead such matters by way of traverse or otherwise as may be proper to show that the writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given that the writ of prohibition do or do not issue, as justice may require; and the party in whose favour judgment shall be given, whether on nonsuit, verdict,
*233] demurrer, or otherwise, *shall be entitled to *the costs attending the application and subsequent proceedings*, and have judgment to recover the same; and, in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess *damages*, for which judgment shall also be given, but such assessment shall not be necessary to entitle the plaintiff to costs." What "damages" can the statute contemplate, except the costs which the party has been put to by the improper proceeding against him in the inferior Court? [KEATING, J.—Has he no means of getting his costs in the Ecclesiastical Court?] None.(*a*) [WILLIAMS, J.—In Tessimond *v.* Yardley, 5 B. & Ad. 458, the Court of Queen's Bench held that the statute did not enable the Court, where a party had declared in prohibition and succeeded, to grant him his costs incurred in the Ecclesiastical Court.] They were not claimed there as "damages." [BYLES, J.—What possible damages could the party have sustained besides the costs?] It is only in the event of a judgment and *execution* in the Ecclesiastical Court that he could sustain any other damages. And that must be of very rare occurrence, for the application for a prohibition is always made before execution. [BYLES, J.—You are in effect asking in the shape of damages for costs in proceedings in the Ecclesiastical Courts in which you were unsuccessful.] That is so. [BYLES, J.—You

(*a*) See Crompton *v.* Waterford, Hetley 167.

aggravated the costs by appealing to the Court of Arches, instead of coming here for a prohibition at once.] Is it to be imputed to the plaintiff as matter of complaint that he does not come to restrain the proceedings in the Consistory Court by prohibition before he has taken the proper steps to ascertain whether or not the improvident judgment of that Court will be upheld? [BYLES, J.—Suppose this Court had directed the writ to issue at once, *instead of directing the plaintiff to declare in prohibition, you would then have been within the case referred to.] We should not in that case have been within the words of the statute. [WILLIAMS, J.—In Buller's Nisi Prius 219, it is said, that, "where an issue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they shall give no more than 1*s.* damages, for it is in nature of an issue to inform the conscience of the Court; but, after he has had judgment quod stet prohibitio, he may bring his action upon the case, and recover the damages he has sustained."] Buggin *v.* Bennett, 4 Burr. 2035, was also referred to. [*234

ERLE, C. J.—I am of opinion that there should be no rule. The plaintiff declared in prohibition, and by the verdict of the jury he is entitled to judgment in that proceeding. The claim is for the costs of the plaintiff's defence in the Ecclesiastical Court, as damages. The short facts are these:—The defendants, who are the churchwardens of the parish of Plumstead, in Kent, had commenced a suit against the now plaintiff for subtraction of church-rate, and obtained judgment against him in the Consistory Court. The plaintiff appealed against that decision to the Arches Court; and again the decision was in favour of the churchwardens. The plaintiff then applied to this Court for a prohibition to the Judge of the Court of Arches and the churchwardens, to prohibit the former from further entertaining, and the latter from further prosecuting, that suit. The now plaintiff, who was directed to declare in prohibition, has been successful upon the issues joined therein both of law and of fact; and he now claims to be entitled under the statute 1 W. 4, c. 21, to recover in the shape of damages the costs incurred by him in the Ecclesiastical Courts. There is no precedent for the recovery of such *costs in the proceeding by prohibition. In Tessimond *v.* Yardley, 5 B. & Ad. 458, an attempt was made to obtain those costs as part of the costs of the prohibition; but it failed. The ground upon which the plaintiff rests his claim is, that the statute provides that "the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the *costs* attending the application and subsequent proceedings, and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess *damages*," but not saying what are damages. Now, effect might be given to the words of the statute, if execution had been issued against the now plaintiff in the Court below, and his goods had been seized and sold under it. The jury might in that case have assessed the damages at the value of the goods so sold. I am not going to attempt to define what was in the contemplation of the legislature as damages: but I am clearly of opinion that they did not intend that the plaintiff should recover these costs as damages. A great part of the costs has resulted from the erroneous decisions of [*235

the Ecclesiastical Courts. If the suit had been dismissed at first, they would have been comparatively small. I am further confirmed in the view I take, because the costs in the Ecclesiastical Courts are always in the discretion of the Judge; and they might in this case have been refused if the defendant had succeeded in the suit. I do not think the legislature could have intended that these costs should be included in the damages which the jury are empowered to award upon the trial of the issues of fact joined in the prohibition.

WILLIAMS, J.—I am of the same opinion. It is clear from the case of Tessimond *v.* Yardley, 5 B. & Ad. 458 (E. C. L. R. vol. 27), which
*236] was decided after the passing of the 1 W. 4, c. 21, *that the Court cannot give the successful party the costs incurred by him in the proceedings in the Ecclesiastical Court as part of the costs of the prohibition. It was suggested by Parke, J., in that case, that possibly the party might get the costs by the award of the Judge of the Ecclesiastical Court: but nobody seems to have thought that they were recoverable as *damages*. When the legislature authorized the jury to assess damages for the plaintiff in prohibition in case he should succeed, I think they never intended that they should give him the costs incurred by him in the inferior Court. If it were otherwise, this great anomaly would result, viz., that the jury would give the amount of the costs incurred in the Court below by way of damages as a matter of right; whereas, the defendant might get rid of that liability altogether by declining the contest and letting the prohibition be made absolute,—in which case, it is clear, the supposed right would vanish. It is impossible the legislature should have contemplated that the question of damages should depend upon that. As to the meaning of "damages" in the statute, it must be recollected that the prohibition was founded upon a notion that the party had been guilty of a contempt in proceeding in the inferior Court after the prohibition served. In order to enable the superior Court to try whether or not the inferior tribunal was exceeding its jurisdiction, the applicant was ordered to declare in prohibition, and by a fiction of law the writ was supposed to be issued, and the inferior Court to be proceeding in defiance of it. The Courts have frequently adverted to and acted upon the supposition that the defendant has gone on after the writ was served. Thus, in Pewtress *v.* Harney, 1 B. & Ad. 154 (E. C. L. R. vol. 20), where it was made a term on enlarging a rule for a prohibition, that the party applying should declare, and he did declare, and
*237] the defendant, instead of *pleading, obtained a Judge's order for staying the proceedings upon payment of the costs incurred since the rule to declare,—upon motion to set aside that order, it was held that the plaintiff in prohibition was not entitled to any further costs. Lord Tenterden there says: "Costs in prohibition depend on the statute 8 & 9 W. 3, c. 11, s. 3, whereby it is enacted, 'that, in all suits upon prohibition, the plaintiff obtaining judgment or any award of execution after plea pleaded or demurrer joined thereon, shall likewise recover his costs of suit.' The plaintiff clearly is not entitled to costs under that statute, because there was not any plea pleaded or demurrer joined. Before plea an application was made to one of the learned Judges of this Court to stay the proceedings on payment of costs; and he finally made an order, that, upon payment of costs

ıcurred since the rule to declare was obtained, all further proceedings hould be stayed. It is contended that this order ought to be set side, so far as it limits the obligation to pay costs to the proceedings ıbsequent to the rule to declare, because, the plaintiff having declared, nd the defendant not having pleaded in time, the plaintiff was entitled ɔ have judgment by default, and a writ of inquiry, upon which he ıight recover damages; and, if he recovered damages, he would be ntitled to costs by the Statute of Gloucester (13 Ed. 1, c. 1); but the nly *damages* which the plaintiff could recover upon a writ of inquiry ould be by reason of contempt committed by the defendant in pro- eeding in the Ecclesiastical Court after the prohibition issued. Here ıere was no contempt, because no proceedings were had after the rohibition issued." And Bayley, J., said: "It is conceded that the laintiff is not entitled to costs, unless he had a right by law to recover amages: now, he could not be entitled to recover damages, unless roceedings were had in *the spiritual Court after prohibition [*238 ssued; and here no such proceedings were had." It is not ıecessary, however, to give any distinct opinion upon that. It is ɔssible that the legislature, when they speak of damages, might have ıad in view the damages for proceeding after the defendant had been erved with the writ of prohibition. But it is enough to say that hey did not intend to include costs incurred in the proceedings below.

BYLES, J.—I also think there should be no rule in this case. It eems to be conceded, that, independently of the statute, costs in pro- ıibition were not recoverable as of right. That raises the question, vhat does the statute mean by *damages?* My Brother *Shee* contends hat it means the costs in the spiritual Court. It is to be observed, ıowever, that, when the legislature speaks of costs in the same sec- ion, it calls them costs. If by "damages," it was meant to give the ɔosts in the Court below, it is fair to presume that the legislature would ıave said so. Besides which, it would appear to be a very strong hing to say, that, if the case were so plain that the writ was ordered ɔ be issued at once, the plaintiff in prohibition should have no costs, ɔut that, if the matter were contested and the plaintiff succeeded, he ıhould have the costs. It would also be a strong thing to say that by ɔur judgment in the prohibition the plaintiff is to have the costs in ıwo suits in the spiritual Court in which he has failed. Further, it is ɔ be remarked, that, if the plaintiff had done in an earlier stage of he proceeding that which he did in a later stage, a very large portion ɔf these costs might have been spared. My Brother *Shee* has pointed ɔut a case in which damages would be sustained, viz., in case of a ıeizure of the plaintiff's goods under an execution issued out of the Court below. Upon the whole, after giving the matter the [*239 ɔest consideration which I am able to bring to bear upon it, it ıeems to me to be quite plain that the present claim is not within the neaning of the statute.

KEATING, J.—I am of the same opinion. I do not think the legis- lature could have intended under the word "damages" to refer to the jury the question of costs of the proceedings in the Ecclesiastical suit. If such had been their intention, they would doubtless have expressed it in plain language. Rule refused.(a)

(a) The rule for a new trial obtained by *Bovill*, Q. C., on a subsequent day in this term, was, in Hilary Term, 1863, discharged.

GEORGE CROSS, Appellant; THOMAS WATTS, Respondent.

Nov. 19.

A person licensed to sell beer by retail, "to be drunk or consumed *off the premises*," supplied a pint of beer to a traveller who sat upon a bench placed and fastened against the wall of the house, returning the mug in which he was served,—Held, that the beer-shop keeper was properly convicted of the offence of selling beer to be drunk *on the premises*, within the 4 & 5 W. 4, c. 85, s. 17.

The justices are not warranted in adjudicating a forfeiture of the license without *legal proof* of a former conviction: a mere reference to the records of the petty sessions, where former convictions were entered, will not suffice.

THE following case was stated for the opinion of the Court under the provisions of the statute 20 & 21 Vict. c. 43.

George Cross, of Shutford, in the county of Oxford, was summoned before one of Her Majesty's justices of the peace acting in and for the Banbury and Bloxham division of the county of Oxford, under the statutes 1 W. 4, c. 64, s. 7, and 4 & 5 W. 4, c. 85, ss. 4 and 17,

*240] *to answer an information laid by Thomas Watts, an officer of Excise, alleging that he the said George Cross (being a person not duly licensed to sell beer, cider, and perry, as the keeper of a common inn, alehouse, or victualling-house), on the 25th of July, 1862, at Shutford aforesaid, did sell one pint of beer by retail to be drunk and consumed in and upon the house and premises where sold, without having an excise retail license in force authorizing him so to do.

The appellant appeared both personally and by his attorney in answer to the summons. It was proved by the excise officers, and admitted by the appellant, that he had a license to sell beer *off* his premises, but he had no license to sell *on;* and he was not a licensed victualler. The following facts were sworn to by Martin O'Donoghue, an excise officer; and they were not disputed by the appellant or his attorney, except as to the date of the alleged offence, as mentioned below. O'Donoghue deposed, that, on the day in question, the 25th of July, he was driving past the appellant's house, and, seeing two men sitting on a form outside the house, drinking beer, he (the officer) alighted from his gig, and went up to the door and asked for a pint of beer. The appellant and his wife were both present when he called for the beer. O'Donoghue then sat down on the form by the side of the two men: the appellant's wife brought him the pint of beer out of the house in one of her own mugs or drinking-cups, and he paid her 2½*d.* for the beer. O'Donoghue and the two men drank the beer between them as they sat on the form; and, when they had drunk it, O'Donoghue placed the cup on the sill of the appellant's window outside, and then went away. The form stood just outside the appellant's street-door, and touching the wall of his house. The eaves of the house projected some inches over the form; and the

*241] *appellant's son, who was called for the defence, stated that he had particularly noticed the walls of the house, and the foundation extended farther out into the street than the eaves; and therefore it appeared that the form stood either wholly or partially upon the appellant's property, although outside his house. It did not appear whether the form was fixed either to the ground or to the appellant's

house: but it was removed between the time of the sale of the beer to O'Donoghue and the hearing of the summons. O'Donoghue proved that he had seen the form there for three or four months, and that it was used for people to sit and drink on.

A witness named Walker was called for the appellant, who confirmed the evidence of O'Donoghue, except that he stated that the transaction took place on the 4th of July instead of the 25th: but O'Donoghue was positive it was on the 25th.

It appeared from the record of the petty sessions that the appellant had been previously convicted before the same bench at the several times and for the offences following, that is to say:—

20th March, 1851, for keeping open beer-house after 10 o'clock at night.

16th June, 1859, having in his possession unjust beer-measures.

11th August, 1859, selling beer *on* his premises, without a license: fine 8*l.* and costs 12*s.*

22d December, 1859, a like offence: fine 10*l.* and costs 2*l.*

4th July, 1861, a like offence: fine 5*l.* and costs 13*s.*

The present case was heard on the 25th of September, 1862.

Under these circumstances, and upon the above evidence, the magistrates convicted the appellant in the penalty of 12*l.* and costs, and they adjudged *that his license to sell beer by retail off his premises should be forfeited. The appellant thereupon [*242 expressed himself dissatisfied with the determination, and applied for a case for the opinion of this Court.

The opinion of the Court was therefore requested, whether the justices were right or wrong in convicting the appellant and adjudging his license to be forfeited, as above mentioned.

T. E. Davis, for the appellant.(*a*)—There was no proof of any fact upon which the justices in this case could convict the appellant of an infringement of the condition of his license. The Act under which he was licensed, 11 G. 4 & 1 W. 4, c. 64, after reciting that "it is expedient, for the better supplying the public with beer in England, to give greater facilities for the sale thereof than are at present afforded by licenses to keepers of inns, alehouses, and victualling-houses," by *s. 1 enacts that it shall be lawful for any and every person [*243 who shall obtain a license for that purpose under the provisions of this act, to sell beer, ale, and porter by retail in any part of England, *in any house or premises specified in such license.* That

(*a*) The points marked for argument on the part of the appellant were:—

"1. That there was no evidence before the justices of any sale of beer by the appellant to be drunk or consumed in the house and premises where sold:

"2. That the justices do not find as a fact that there was any sale of beer inconsistent with the appellant's license:

"3. That the facts stated in the case are quite consistent with a sale of beer authorized by the appellant's license:

"4. That, upon this information, the justices had no authority to adjudge a forfeiture of the appellant's license:

"5. That the justices could not, apart from the evidence adduced before them, take judicial notice of the records of the petty sessions, and adjudge the forfeiture of the license, without proof of the previous convictions in the presence of the appellant; and that it does not appear that such proof was given:

"6. That it appears from the case that the conviction of the appellant was not founded upon the evidence adduced before the justices; but under alleged circumstances not duly proved before them."

being found to give too great facilities for drunkenness and disorderly conduct, the 4 & 5 W. 4, c. 85, was passed to amend that act. The 4 & 5 W. 4, c. 85, by s. 1 enacts "that it shall be lawful for the commissioners of Excise, or other persons duly authorized, to grant licenses for the sale of beer, ale, porter, cider, or perry, under the provisions of the recited act, to any person applying for the same, but that such license shall not authorize the person obtaining it to sell beer or cider to be drunk or consumed in the house or on the premises specified in the same license," unless the same be granted upon the certificate mentioned in s. 2. And the 17th section enacts that "every person not being duly licensed to sell beer, cider, and perry as the keeper of a common inn, alehouse, or victualling-house, who shall sell any beer, cider, or perry by retail *to be drunk or consumed in or upon the house or premises where sold*, without having an Excise retail license in force authorizing him so to do, whether such person shall or shall not be licensed to sell beer to be drunk or consumed off the premises where sold, shall forfeit 20*l*." The offence imputed to the appellant here is, selling beer to be drunk *on* the premises, he being licensed only to sell beer to be drunk or consumed *off* the premises. The facts, it is submitted, disclose no infringement either of the letter or the spirit of the Act or of the appellant's license. The beer sold to O'Donoghue was not drunk on the premises, but in the street. The object of the statute was to enable persons to get beer to be consumed at their own homes, without the necessity of going *244] to an ordinary *public-house for it; and the mischief to be guarded against was the assembling of dissolute and disorderly characters within doors. Once in the street, the customer is wholly out of the control of the beer-shop keeper. The Act is of a highly penal character, and therefore should receive a strict construction. [BYLES, J.—Suppose the beer was supplied to an old gentleman who brought his own camp-stool and his own vessel for it, and he chose to sit just outside the house to rest and refresh himself,—would the beer-shop keeper incur a penalty?] It is submitted that he would not; and it is not very easy to distinguish that case from the present.

Welsby, for the respondent.(*a*)—After carefully considering the matter, and conferring with the Attorney-General, we have come to the conclusion that this was not a second conviction within the meaning of the Act (3 & 4 Vict. c. 61), and therefore that the magistrates were not warranted in adjudging the license to be forfeited. The only question is, whether the appellant has been guilty of an offence against the 1st section of the 4 & 5 W. 4, c. 85, construed with the license and as expanded by the 4th section, which enacts, "that, if any person licensed to sell beer or cider not to be consumed upon the premises, shall, with intent to evade the provisions of this Act, take *245] or carry, or authorize or *employ or permit or suffer any person to take or carry any beer or cider out of or from the house

(*a*) The points marked for argument on the part of the respondent were,—

"1. That the facts stated in the case show an offence against the provisions of the 11 G. 4 & 1 W. 4, c. 64, s. 15, and the 4 & 5 W. 4, c. 85, ss. 1, 17:

"2. That the case discloses evidence on which the justices might determine that such offence had been committed by the appellant:

"3. That the justices were authorized by the Acts of Parliament, 11 G. 4 & 1 W. 4, c. 64, 4 & 5 W. 4, c. 85, and 3 & 4 Vict. c. 61, in declaring the appellant's license to be forfeited."

or premises of such licensed person for the purpose of being sold on his account, or for his benefit or profit drunk or consumed in any other house, or in any tent, shed, or other building of any kind whatever belonging to such licensed person, or hired, used, or occupied by him, such beer or cider shall be deemed and taken to have been drunk or consumed upon the premises, and the person selling the same shall be subject to the like forfeitures and penalties as if such beer or cider had been actually drunk or consumed in any house or upon any premises licensed only for the sale thereof as aforesaid." Selling beer to be drunk in a skittle-ground or a bowling-green attached to the house would clearly be an offence within s. 17. In what respect does that differ from supplying beer to a person sitting on a bench fixed to the front of the house? If this was a drinking *off* the premises, then the sale took place off the premises, which is clearly not within this man's license. The sale must be *on* the premises, the beer to be carried away and consumed elsewhere. [ERLE, C. J.—He is not charged with selling beer *off* the premises. It is clear that this was within the mischief intended to be remedied.] It is submitted that it is also clearly within the words of the statute, which must be construed, like any other document, according to the ordinary rules of grammer.

Davis, in reply.—Suppose, instead of alighting from his gig, O'Donoghue had had the beer brought out to him and had drunk it in the highway,—could the appellant have been convicted of an offence against the act?

ERLE, C. J.—I am of opinion that the conviction in *this case [*246
was right. The statute 3 & 4 W. 4, c. 85, s. 1, enacts that beer may be sold on certain conditions and under a certain license, to be drunk or consumed off the premises where it is sold. It is not for us to speculate upon the motives which influenced the legislature in passing that Act; all we have to do, is, to look at its words, and put the best construction we can upon them, and see whether the facts disclosed in the case before us show that the appellant has been guilty of the offence charged. The officer of the Excise lays an information against him for selling beer to be drunk *on* the premises, in contravention of his license which only empowered him to sell beer to be drunk or consumed *off* the premises. Upon the facts stated, I think there was sufficient evidence to justify the magistrates in convicting. The informer, it appears, drove up to the house, and saw two men sitting upon a form or bench, which in some sense was a part of the premises, drinking beer. He went to the door and asked for a pint of beer. The appellant's wife, the appellant being present, brought him the beer, and he sat on the bench outside, and drank it there. I cannot say the justices were wrong in holding that the bench formed part of the premises, and that consequently the appellant was guilty of selling beer in contravention of the statute and of his license. If the object of the legislature was that the beer sold at these places should be taken away and drunk at the consumers' homes, as suggested by Mr. *Davis*, that provision might easily be evaded by putting up outside of the house a convenient place for its consumption on the spot. That would be virtually selling beer to be drunk upon the premises. I am unable, therefore, to say that the conviction is wrong.

WILLIAMS, J.—I am of the same opinion. The case turns upon an
*247] inquiry of fact. The only question is, *whether or not there was evidence before the justices of the penalty having been incurred. It seems to me, that, upon the facts stated, the justices might well come to the conclusion that the bench put up outside the appellant's premises was put there by the keeper of the beershop for the express purpose of accommodating guests. He had the right to exclude any one else from using it, if he pleased. I think it was abundantly clear that the bench formed part of the appellant's premises.

BYLES, J.—I concur with my Lord and my Brother Williams, but with considerable doubt and some reluctance. If the conviction were formally drawn up, it must be quashed; and I think the party should have the same benefit as if that had been done.

KEATING, J.—I concur with the rest of the Court in thinking the justices were warranted in coming to the conclusion at which they arrived. The facts undoubtedly bring the case very close to the line, as is the case in all evasions of statutory provisions. From the permanent character of the bench, and its position, it must be presumed to have been the property of the owner of the house, and to have been placed there for the exclusive accommodation of his guests. Whether fixed to the wall of the house or not is left in doubt; it having been since removed. But it appears that it did stand either wholly or in part on the premises occupied by the appellant. I therefore think the justices were warranted in coming to the conclusion that the appellant did sell the beer in question to be drunk on the premises, and so was guilty of the offence charged.

*248] ERLE, C. J.—The conviction, if drawn up in form, *would, as my Brother Byles suggests, be bad for including the adjudication of a forfeiture.

Welsby.—That adjudication would form no part of the conviction. I do not ask for costs; and I will communicate with the Attorney-General upon the subject of the doubt expressed.

Decision affirmed.

ROBERTSON *v.* STERNE. *July* 12.

Where the plaintiff (in a case within the London Small Debts Act, 15 & 16 Vict. c. lxxviii., s. 120), upon a compulsory order of reference in the common form made under the Common Law Procedure Act, 1854,—by which the costs of the cause are to abide the event of the award,—recovers less than 10*l.*, he is not entitled to costs, without an order.

THIS was a reference in the common form under the compulsory clauses of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, the parties residing within the jurisdiction of the London Small Debts Act, 15 & 16 Vict. c. lxxvii. The costs of the action were to abide the event of the award, and the costs of the reference and award or certificate to be in the discretion of the master. The master certified in the plaintiff's favour for 3*l.* 7*s.* 6*d.*, directing that each party should pay his own costs of the reference, and that the plaintiff should pay two-thirds and the defendant one-third of the costs of the certificate.

The master having allowed the plaintiff the costs of the cause,

O'Brien, Serjt., on a former day in this term, obtained a rule nisi to set aside the taxation, and to amend the judgment by reducing the assessment of costs.

**G. W. Harrison* showed cause.—This a judgment by default, upon terms; and there is nothing upon which the Judge can [*249 certify. The defendant applies to have the matter referred to the master, and it is referred upon terms, one of which is that the costs of the action *shall abide the event.* In Griffiths *v.* Thomas, 4 D. & L. 109, after issue joined in an action on the case for diverting a water-course, "all matters in difference in the cause" were referred by a Judge's order to arbitration, "the costs of the said suit to abide *the event* of *the award*;" but no power was given to the arbitrator to certify under the 3 & 4 Vict. c. 24, s. 2. The arbitrator found for the plaintiff on all the issues, and assessed his damages at 6*d.*; and the master thereupon allowed the plaintiff the full costs: and, upon motion to review the taxation, Coleridge, J., construed the meaning of the parties to be that the 3 & 4 Vict. c. 24, s. 2, should not apply, and therefore held the taxation to be correct. "It seems to me," says that learned Judge, "that the true meaning of the submission is what its words import, that costs, *i. e.* the payment of costs, should follow the event,—*i. e.* the legal event of the award,—that he in whose favour the decision was should be paid by the other party the costs of the suit." So, in Wigens *v.* Cook, 6 C. B. N. S. 784 (E. C. L. R. vol. 95), the declaration contained seven counts, one of which was a count in trover for two deeds and two authorities for the delivery of deeds: by an order of Nisi Prius, it was agreed that the record should be withdrawn, and the cause and all matters in difference be referred to an arbitrator, who was to have "all the powers as to certifying of a Judge at Nisi Prius,"—the costs of the cause to abide *the event of the award*, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator made his award in favour of the plaintiff as to the two authorities referred to in [*250 *the count in trover, with one farthing damages, and found all the other issues for the defendant; and he gave the defendant the costs of the reference and award. This Court held, that, as the event of the award was in favour of the plaintiff, he was entitled to the costs of the cause,—the 3 & 4 Vict. c. 24, s. 3, being inapplicable, inasmuch as there was no *verdict.* Cockburn, C. J., says: "The 'event' must be taken to mean such a finding in favour of one party as will entitle him to a judgment in the cause. The plaintiff has such a finding in his favour here; and, by the agreement into which the parties have entered, the costs must follow." Again, in Jones *v.* Jones, 7 C. B. N. S. 832 (E. C. L. R. vol. 97), a cause was referred by Judge's order, before verdict,—*the costs of the cause and of the reference and award to abide the event of the award:* the arbitrator found for the plaintiff upon certain issues, damages 12*l.* 12*s.*, and that there was due to the defendant on a plea of set-off 9*l.* 7*s.* 9*d.*; and he awarded that the defendant should forthwith pay to the plaintiff the balance of 3*l.* 4*s.* 3*d.*: it was held, that, the event of the cause being in favour of the plaintiff, he was entitled to costs. [WILLIAMS, J.—The only question here is, whether the award of the master

is the event contemplated by the London Small Debts Act, 15 & 16 Vict. c. lxxvii. s. 120.] In Jones *v.* Jones, Erle, C. J., says: "The event of the action is in favour of the plaintiff, and the costs are consequently due to him *by the terms of the reference.* The enactment in the County Court Act, 13 & 14 Vict. c. 61, s. 11, has no application to the case of a sum given by an award made under a reference with a stipulation that the costs of the cause shall abide the event." [WILLIAMS, J.—No doubt, that was a perfectly right decision.]

*251] *O'Brien*, Serjt., in support of his rule.—The 120th *section of the London Small Debts Act enacts, that, if, in any action in a superior Court, in covenant, debt, detinue, or assumpsit, the plaintiff shall recover a sum less than 20*l.*, "the plaintiff shall have judgment to recover such sum only, and no costs,"—unless there shall be a certificate under s. 121, or an order under s. 122. Now, the question is whether the plaintiff here has recovered by the judgment of the Court a sum less than 20*l.* The propriety of the decisions in the cases cited is not questioned: they were all cases of references by consent, the order or submission embodying the agreement of the parties, and the event being determined by that agreement. On a compulsory reference under the Common Law Procedure Act, however, the plaintiff recovers by the judgment of the Court. [WILLIAMS, J., referred to Kendil *v.* Merritt, 18 C. B. 173 (E. C. L. R. vol. 86), where it was held that the form (No. 10) of the writ of execution, where matter of account is referred to and decided on by an arbitrator or officer of the Court, as settled by the Judges by the rule of Michaelmas Vacation, 1854, does not dispense with the signing of judgment or the obtaining a rule or order under the 1 & 2 Vict. c. 110, s. 18.] The cause is still in Court: which is not the case with an ordinary submission to arbitration. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the Court:—

The question is, whether, upon a compulsory order of reference in the common form made under the Common Law Procedure Act, 1854, the plaintiff, recovering less than 20*l.*, is entitled to costs without an order.

There can be no doubt, since the decision of this Court in Kendil *v.* Merritt, 18 C. B. 173 (E. C. L. R. vol. 86), that the plaintiff succeeding upon such a reference to the master equally *recovers

*252] the amount awarded as if he had obtained a verdict for the same: and the question, therefore, turns upon the London Small Debts Act, 15 & 16 Vict. c. lxxvii. s. 120, which enacts, that, if in an action of contract within the jurisdiction, the plaintiff "shall recover a sum not exceeding 20*l.*," &c., "the plaintiff shall have judgment to recover such sum only, and no costs," except in certain cases within which this does not fall.

This section in terms deprives the plaintiff of his costs, in the event which has happened, unless the order in its terms can and does dispense with the statute.

It appears to us, however, that the statute and the order are not necessarily in conflict; for that the section adds to the ordinary events of a cause a third and modified one, viz. for the plaintiff, but without costs, unless he obtain an order; and that the order of reference, which is the same in all cases, and speaks the language of the *Court* when it says that the costs of the cause "shall abide the event," refers to the event quoad costs equally as to the mere event in favour of the

plaintiff or defendant, and that it cannot justly be imputed to the judges who framed it that they intended to exclude from the operation of the statute *all* cases in which there was a compulsory reference.

The decisions referred to as to references by consent before trial,—Wigens *v.* Cook, 6 C. B. N. S. 784 (E. C. L. R. vol. 95), and Jones *v.* Jones, 7 C. B. N. S. 832 (E. C. L. R. vol. 97),—are obviously inapplicable, because to the result of such a reference the law attaches no special consequences as to costs; whereas, in the event which has here taken place, there is a statute which says expressly that the plaintiff shall have no costs.

The rule to review the taxation ought, therefore, to be made absolute. Rule absolute.

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*CROSS *v.* CROSS. *Nov.* 5. [*253

Where an arbitrator had awarded the plaintiff less than 20*l.* in an action of contract, but by inadvertence had omitted to certify that the cause was fit to be tried before a Judge of a superior Court,—the Court allowed the matter to go back to the arbitrator for amendment at the expense of the plaintiff.

DAVID KEANE moved for a rule calling upon the defendant to show cause why the award of an arbitrator, which was in favour of the plaintiff for a sum under 20*l.*, should not be sent back to him for amendment, by certifying (which by the terms of the order of Nisi Prius he had the power to do) that the cause was fit to be tried before a Judge of a superior Court. The affidavit stated that the arbitrator had intended so to certify, as both parties well knew, but had inadvertently omitted to do so. He referred to Caswell *v.* Groucutt, 31 Law J., Exch. 361, where an arbitrator to whom an action for a claim above 20*l.* had been referred as a matter of account, awarded to the plaintiff a sum less than 20*l.*, and certified that the action was fit to be brought in a superior Court, but give no other certificate, and, the master having taxed the costs on the lower scale, the arbitrator, on being applied to on behalf of the plaintiff, stated in effect that he intended by his certificate to give the plaintiff his costs,—the Court gave the plaintiff leave, at his own expense, to refer the matter back to the arbitrator.

ERLE, C. J.—Upon the authority of that case, you may take a rule upon the same terms, absolute unless cause be shown within four days.

No cause was shown. Rule accordingly.

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*REDWAY *v.* WEBBER and ALGER. *Nov.* 11. [*254

Where one of two defendants in an action of *contract* is struck out of the record at the trial, and the plaintiff obtains a verdict against the other, the ordinary course of taxation is, to tax the whole costs of the action on each side, and deduct from the plaintiff's costs a moiety of the costs of the defence,—by analogy to the old rule in the case of the acquittal of one of two defendants in an action of tort.

THIS was an action of contract against the defendants as co-owners

of a ship. The cause was tried before Blackburn, J., at the last assizes at Exeter. The learned Judge intimating an opinion that the evidence failed to establish a case against the defendant Webber, the plaintiff's counsel asked and obtained leave to strike out his name pursuant to the 37th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76,(a) and an order was drawn up accordingly on payment of costs. The plaintiff then went on against the defendant Alger, and recovered a verdict against him for 113*l.* The two defendants had pleaded jointly.

On the taxation of costs, the master taxed the plaintiff's costs of the cause and then the defendants' costs of the cause, and allowed the defendant Webber one-half of the general costs of the two defendants.

*255] *Karslake*, for the plaintiff, on a former day in this term, moved to rescind the order and to review the taxation. He submitted that the order should have been to strike out the name of Webber on payment of the costs of and occasioned by the amendment. As it stands at present, the effect is to relieve the defendant Alger to the extent of half the costs of the general defence. [WILLIAMS, J.—What is the practice in tort, where one defendant is acquitted?] To tax the costs as the master has done here. [BYLES, J.—What other rule could the master adopt in cases of contract? The order is for costs to the defendant Webber, to be taxed in the ordinary manner, that is, as between party and party; and, it seems, the practice of the Court in cases of tort is to do as the master has done here.] The only effect of what has been done, is, to relieve the defendant Alger from one-half the costs. [WILLIAMS, J.—The principle of the rule in cases of tort where one defendant is acquitted and a verdict is given against the other, is equally applicable to the case of a defendant struck out under the 37th section of the Common Law Procedure Act, 1852.]

ERLE, C. J.—We will inquire what is done in the other Courts in similar cases. If we find that there is an established practice, of course we will not disturb it. If not, we will consider what would be the most reasonable course to adopt. *Cur. adv. vult.*

ERLE, C. J., now said: In this case the plaintiff's counsel consented at the trial that judgment should be entered for one of the defendants, and the cause proceeded and the plaintiff obtained a verdict against the other. One of the defendants being thus exone-

*256] rated from liability, and entitled to costs, the question *is upon what principle those costs are to be ascertained. The master has proceeded upon this principle:—Assuming the judgment to have been in favour of both defendants, he has taxed the whole costs of the defence, and divided the amount, and deducted a moiety

(a) Which enacts that "it shall and may be lawful for the Court or a Judge in the case of the joinder of too many defendants in any action on contract, at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out if it shall appear to such Court or Judge that injustice will not be done by such amendment; and the amendment shall be made upon such terms as the Court or Judge by whom such amendment is made shall think proper: and, in case it shall appear at the trial of any action on contract that there has been a misjoinder of defendants, such misjoinder may be amended, as a variance, at the trial, in like manner as the misjoinder of plaintiffs has been heretofore (s. 35) directed to be amended, and upon such terms as the Court or Judge or other presiding officer by whom such amendment is made shall think proper."

from the plaintiff's costs of the cause, considering the defendant whose name was struck out entitled to that moiety. It was contended by Mr. *Karslake* that the costs of the defence would necessarily have been the same whether there were one or two defendants, they having joined in pleading; and that the proper course therefore would have been to allow only the costs of and occasioned by the amendment. We find, however, upon inquiry, that there has been an understood rule of practice in all the Courts in actions of tort, where there has been a verdict against one defendant and in favour of the other, to tax the whole costs of the defence and divide the total amount as the master has done here; and that, by analogy to that course of proceeding in tort, the same rule has been adopted in the case of a defendant struck out of the record under the 37th section of the Common Law Procedure Act, 1852. This, then, being the course which has been adopted in all the Courts, and not being able to discover a better one, we think that is to be adhered to. We do not say that circumstances may not arise to warrant a deviation from that rule. There are none, however, here. Rule discharged.(*a*)

(*a*) In Griffiths *v.* Kynaston, 2 Tyrwh. 757, three defendants, being sued in trespass for assault and false imprisonment, appeared by the same attorney, but severed in pleading. The same evidence was adduced for all, with the exception of one witness who was called for one of them separately. That one having been acquitted, the master allowed him 40*s.* costs only. The Court, however, held that he was entitled on taxation to recover from the plaintiff his aliquot proportion of the costs incurred by the three on their joint retainer, as well as the costs he had separately incurred, on satisfying the master that he was not indemnified by the other defendants. The like was held in Griffiths *v.* Jones, 2 C. M. & R. 333,† 5 Tyrwh. 1092, 4 Dowl. P. C. 159. So, in Gambrell *v.* The Earl of Falmouth, 5 Ad. & E. 403 (E. C. L. R. vol. 31), 6 N. & M. 859 (E. C. L. R. vol. 36), where two defendants in trespass severed in pleading, but pleaded the same pleas, all going to the whole action, and one succeeded upon all the issues, the other upon one only,—it was held that each defendant was entitled to his separate costs of the issues on which he had succeeded, and an aliquot part of the joint costs, unless the master was satisfied, that, by reason of special circumstances, less ought to be allowed to either. The defendants in that case having appeared by separate attorneys and counsel, but the attorneys being members of the same firm, and the briefs and evidence being substantially the same, the master taxed the costs as if the parties had appeared by the same attorney: and it was conceded that the taxation in that respect could not be disturbed.

The rule is very concisely and accurately stated in Marshall on Costs, 2d edit. (1862), p. 42. "The rule," says the learned author, "according to which costs are given where there are several defendants in a personal action, and the verdict is in favour of one or more of them and against the others, is this:—The successful defendant is allowed *all* his *separate* costs, and primâ facie an aliquot part of the joint costs, unless the master is satisfied that some smaller proportion should be allowed by reason of any other special circumstances. (Griffiths *v.* Jones, 2 C. M. & R. 333;† Bartholomew *v.* Stephens, 5 M. & W. 386,† 7 Dowl. P. C. 808, Gambrell *v.* The Earl of Falmouth, 5 Ad. & E. 403 (E. C. L. R. vol. 31), 6 N. & M. 859 (E. C. L. R. vol. 36);† Norman *v.* Climenson, 4 Scott N. R. 735, 4 M. & G. 243 (E C. L. R. vol. 43). And in such case the costs of the successful defendant may, on taxation, be set off against the damages and costs recovered by the plaintiff against the unsuccessful defendants, whether the defendants appeared by the same or different attorneys, or by the same or different counsel (Lees *v.* Reffitt, 3 Ad. & E. 707 (E. C. L. R. vol. 30), 5 N. & M. 340 (E. C. L. R. vol. 36); George *v.* Elston, 1 N. C. 513 (E. C. L. R. vol. 27), 1 Scott 518; Starling *v.* Cosens, 5 Tyrwh. 823, 2 C. M. & R. 445,† 3 Dowl. P. C. 782), and without regard to the lien of the plaintiff's attorney: Noble *v.* Noble, 1 H. Bl. 23; George *v.* Elston, 1 N. C. 513, 1 Scott 518."

*258] *SIMMONDS v. HUMBLE and Others. *Nov.* 6.

Hops were sold by sample, and, before prompt day, the buyer's foreman attended at the warehouse of the seller's factors to see them weighed, compared each pocket with the sample, and adjusted allowances on some which he objected to:—Held, that this was a sufficient acceptance to satisfy the 17th section of the Statute of Frauds, 29 Car. 2, c. 3.

THIS was an action for the breach of a contract for the sale of a quantity of hops. The defendants traversed the making of the contract.

The cause was tried before Erle, C. J., at the sittings at Guildhall after last term, when the following facts appeared in evidence:—The plaintiff and the defendants were respectively hop-merchants. In January, 1862, the defendants agreed to buy a quantity of hops belonging to the plaintiff. The contract was made by one Peacock, who was the salesman of certain persons trading under the name of The Hop Planters' Joint Stock Company, who were the factors of the plaintiff. A sale-note was made out by Peacock in the following form:—

"January 29th, 1862.

"Messrs. Humble & Co. bought of The Hop Planters' Joint Stock Company, 176 pockets hops (Smith, 1859) @ 58*s*."

No signature was affixed to this document.

On the part of the defendants, it was objected that there was no sufficient contract within the 17th section of the Statute of Frauds.

For the plaintiff, reliance was placed upon the decision of the Exchequer Chamber in Durrell *v.* Evans, 31 Law J., Exch. 337. There, after negotiations between the defendants and Noakes (the factor of the plaintiff) as to the purchase of hops, the plaintiff, one of the defendants, and Noakes, met at Noakes's office, and agreed for a price, and Noakes drew out the following document: "Messrs. Evans. Bought of J. Noakes, 33 pockets. T. Durrell. Ryarsh and *259] *Addington, @ 16*l.* 16*s*. October 19th, 1860." The defendant requested that the date might be altered to the 20th, which, by the custom of the trade, would give a week's more time for payment. The plaintiff and Noakes consented, and the alteration was accordingly made in the document by Noakes, who handed it to the defendant, who took it away with him. The document was written on a leaf torn from Noakes's book, in which was a counterfoil, and this was left in Noakes's possession, and followed the terms of the other document, except that, instead of "Messrs. Evans, bought of J. Noakes," was simply "Sold to Messrs. Evans." And it was held,—reversing the judgment of the Court of Exchequer, 30 Law J., Exch. 254, 6 Hurlst. & N. 660,†—that there was evidence from which a jury might find that Noakes was the agent of the defendants as well as of the plaintiff to draw up a record of the contract between them; and that, if he were, the writing by him of "Messrs. Evans" was a signature binding on the defendants within the 17th section of the Statute of Frauds.

The Lord Chief Justice, upon the authority of that case, overruled the objection, but reserved the defendants leave to move.

It was further contended on the part of the plaintiff that there had

been a sufficient acceptance of the hops to take the case out of the statute. As to this the evidence was as follows:—The usual course upon a sale of hops, is, for the parties to meet to ascertain the weight and to compare the samples with the bulk before the prompt-day. And here the parties attended by their respective agents for that purpose and weighed and compared all the pockets, and agreed upon certain allowances to be made as to certain of them which were objected to. Nothing further was done. But one of the plaintiff's witnesses stated that after the *weighing and comparing no objection could by the usage of the trade be allowed.(a) [*260

His Lordship left it to the jury to say whether or not there had been an acceptance of the hops under the contract. They found in the affirmative, and accordingly returned a verdict for the plaintiff, damages 851*l.* 9*s.* 6*d.*

Hawkins, Q. C., now moved to enter a verdict for the defendants or a nonsuit, or for a new trial. He submitted that the memorandum was not such a contract as would satisfy the statute. [BYLES, J.—The name of the vendor, the names of the purchasers, the number of pockets, the description, and the price, are all there, but in the body of the document. I see no appreciable difference between the note here and that in Durrell *v.* Evans.] There was no evidence that Peacock was the agent of the defendants. He was the servant of the factors who represented the plaintiff. Assuming the insertion of the names of the defendants in the body of the contract to be tantamount to a signature, Peacock had no authority to sign for them. Durrell *v.* Evans was treated as being decisive of the matter: but that case is still sub judice. [BYLES, J.—Humble & Co. ask for a note of the contract; they get it, and they keep it. Does the note bind the plaintiff?] Yes. It was made by his agent, and on his behalf. The *vendee is not bound by asking for a sale-note, intending to fix the vendor. Then, there was no evidence of acceptance. [*261 The party who went to the warehouse with the samples merely had authority to inspect and to superintend the weighing. He had no authority to accept the hops on behalf of the defendants.

WILLIAMS, J.—It appears to me that it is unnecessary to consider the first point made by Mr. *Hawkins*, because, whether there was or was not a sufficient note or memorandum of the contract to satisfy the statute is quite immaterial if there was a sufficient acceptance. As to the second point, I have felt some difficulty whether I ought to express my opinion or to wait to hear what my Lord says. He, however, thinks the point was not reserved, and therefore it resolves itself into a question of misdirection. Now, looking at the facts, and at the way the matter was presented to the jury, I am clearly of opinion that there was no misdirection. The vendor employed an agent to conduct the sale, who happened to be the warehouseman of the hops. No point appears to have been made as to whether there was a suffi-

(a) The course of business in the hop trade, as stated and admitted in Durrell *v.* Evans, is as follows:—"After the purchase is completed by the factor, an appointment is made between the vendor and the purchaser for the hops to be weighed, for which purpose they are sent by the vendor to his factor's warehouse. The warehouseman of the factor generally weighs on behalf of the vendor, and the purchaser either comes himself or sends some one to see them weighed on his behalf."

And see Bannerman *v.* White, 10 C. B. N. S. 844 (E. C. L. R. vol. 100).

cient receipt. The result is, that, as soon as the sale was perfected, the warehouseman began to hold the hops for the buyer. As to the acceptance,—The question is, whether there was any evidence upon which the jury might properly be directed to find that there had been a sufficient acceptance. I think there was. After the making of the contract, there was not only a verification of the bulk by comparison with the sample, but a weighing and approval by the agents of both parties. Add to this the evidence of the witness who stated that he never knew of an instance of a contract having been thrown up after this ceremony had been gone through. I am of opinion that there is no ground whatever for disturbing the verdict.

*262] *BYLES, J.—I am of the same opinion. The 17th section of the Statute of Frauds requires in the case of a verbal contract, which we must for this purpose assume this contract to have been, that the buyer should have accepted the goods and actually received the same. As to acceptance,—the hops were compared with the samples and weighed, and the allowances settled on certain of the pockets which were objected to, deductions from the price to be paid. I observe also that there was evidence, that, by the usage of the trade, after the hops have been weighed and approved, objections are no longer heard. It is clear, therefore, that there was an acceptance. Then, the statute requires that the goods shall be actually received. Now, here was a verbal contract made by the bailee of the hops. The moment that contract was complete, the bailee became the bailee of the buyers. No objection, therefore, could be taken to the want of a sufficient receipt. The jury have found upon legal evidence, independently of the written contract, that the buyers accepted the hops and actually received the same.

KEATING, J., and ERLE, C. J., concurring, Rule refused.

*263] *BRUFF v. CONYBEARE. *June* 14.

Where parol evidence has been improperly received to explain a supposed latent ambiguity in a written document, the Court will decide upon the construction of the instrument, without regard to the finding of the jury upon such evidence.

The plaintiff, an engineer, had been professionally concerned in promoting a scheme for converting the Chard Canal into a railway, and three successive Acts were obtained for carrying it into effect, but were allowed to expire. The defendant, also an engineer, being desirous of constructing a railway over the same line of country, entered into a negotiation with the plaintiff, the result of which was reduced into writing and signed by the defendant, as follows,—

"Chard Canal and Railway Company.

"In consideration of your transferring all the interest you may have in this company, and handing me all the plans, papers, and documents in your possession, I hereby undertake to pay you the sum of 600*l.*, provided my friends succeed in carrying out the undertaking. The amount, 600*l.*, is to be paid as follows,—300*l.* on the first portion of the land required for the railway being acquired by the company, and the balance out of the three first payments received by me on the foot of construction account."

On the following day, the defendant wrote upon the document (signing it) at the plaintiff's suggestion the following,—

"It is understood that the 600*l.* herein is to become payable on the obtaining of the Act,—one moiety in six months, and the residue in three annual instalments:"—

Held, that the two writings together formed the agreement; and that the defendant's liability to pay the 600*l.* was contingent upon "the undertaking" (whatever that might mean) being carried out by his friends,—so that he might be employed as the engineer in the construction of the line.

THIS was an action for an alleged breach of a contract by which the defendant agreed to pay the plaintiff the sum of 600*l.*, by two instalments of 300*l.* each.

The first count of the declaration stated, that, on the 28th of May, 1860, in consideration that the plaintiff, at the request of the defendant, would transfer all the interest he (the plaintiff) might have in a certain proposed company, called The Chard Canal and Railway Company, and would hand to the defendant the plans, papers, and documents in the plaintiff's possession in connection therewith, the defendant undertook and promised and agreed to and with the plaintiff to pay him the sum of 600*l.*, the said sum of 600*l.* to become and be payable and paid by the defendant to the plaintiff on the obtaining of the Act of Parliament for making the same, one moiety within six months of such Act being obtained, and the residue in three annual instalments: Averment, that, in pursuance of the said agreement, and on the faith of the said promise of the defendant, the plaintiff did transfer to the defendant all the interest he had or might have in the *said company, and did hand to the defendant the plans, [*264 papers, and documents in his possession in connection therewith: Breach, that, although the said Act of Parliament in and by the said agreement and promise mentioned and referred to was obtained, and more than six months had elapsed after the same was so obtained, and before this suit, and although all things had happened and been performed, and all times had elapsed necessary to entitle the plaintiff to maintain the action, yet the defendant had not paid the said moiety of the said sum of 600*l.*, to wit, 300*l.*, or any part thereof.

The second count stated that the defendant was indebted to the plaintiff for work and labour of the plaintiff and the price and value thereof, and for certain interests of the plaintiff of and in a certain company transferred and handed over to the defendant at his request, and for divers plans, papers, and documents in the plaintiff's possession and connected with a certain proposed company, at the like request of the defendant handed over by the plaintiff to the defendant at his request, and for money found to be due from the defendant to the plaintiff on divers accounts stated. Claim, 400*l.*

The defendant pleaded that he did not promise in manner and form as alleged, and several other pleas, upon which issues were joined.

The cause was tried before Erle, C. J., at the last Spring Assizes at Kingston. The facts which appeared in evidence were as follows:—In July, 1846, an Act (9 & 10 Vict. c. ccxv.) was passed, intituled "An Act to enable the Chard Canal Company to convert into a railway a portion of the Chard Canal from Creech St. Michael to Ilminster, all in the county of Somerset." In July, 1847, another Act (10 & 11 Vict. c. clxxv.) was passed, intituled "An Act to enable the Chard Canal *and Railway Company to extend their railway [*265 from Ilminster to Chard, all in the county of Somerset." Nothing was done under either of these Acts except the deposit of plans. In August, 1853, another Act (16 & 17 Vict. c. cxcii.) was passed, intituled "An Act to revive and amend the powers of the Acts relating to the Chard Railway Company, to regulate the capital

of the company, and to enable them to extend their authorized railway into Taunton." The plaintiff had been the engineer employed to assist in carrying the last-mentioned bill through Parliament, for which services a sum of 600*l.* was due to him from the promoters of the scheme. One Domett was the solicitor employed on that occasion. Nothing was done under this Act, and its powers expired.

About the end of the year 1859, the defendant was desirous of constructing a line of railway to connect the Bristol Channel with Exmouth; and he communicated to Mr. Domett that he proposed to make a line between Chard and the Bristol and Exeter line at Taunton. Mr. Domett said that a considerable saving in time and money would be effected if he (the defendant) would apply for a renewal of the powers granted to the Chard Railway Company by the Acts above referred to; but that, in that case, he would have to satisfy the claim of the plaintiff, Mr. Bruff, who had considerable influence in that part of the country. Accordingly, the defendant was put in communication with the plaintiff, and they met at the office of a solicitor in London for the purpose of entering into an arrangement; and on the 28th of May, 1860, the defendant wrote and sent to the defendant what he understood to be agreed between them, as follows:—

"Chard Canal and Railway Company.

*266] "Dear Sir,—In consideration of your transferring *all the interest you may have in this company, and handing me all the plans, papers, and documents in your possession, I hereby undertake and agree to pay you the sum of 600*l.*, provided my friends succeed in carrying out the undertaking. The amount, 600*l.*, is to be paid as follows,—300*l.* on the first portion of land required for the railway being acquired by the company, and the balance out of the three first payments received by me on the foot of construction account. "H. CONYBEARE."

The parties met again on the following day, when the plaintiff objected that Mr. Conybeare's note did not express what was his understanding of the agreement between them; and, after some discussion, the defendant, at the plaintiff's suggestion, wrote (in red ink) across the paper,—"It is understood that the 600*l.* herein is to become payable on the obtaining of *the Act*,—one moiety in six months, and the residue in three annual instalments. H. CONYBEARE."

The following memorandum was added:—

"Also that the measure is to be bonâ fide prosecuted by the introduction of a bill into Parliament: and the furnishing me with such documents, plans, and information, is merely an honourable undertaking. "H. CONYBEARE."

Ultimately it was found impossible to carry out the scheme of converting the Chard Canal into a railway; and in August, 1861, the defendant and those acting with him obtained an Act (24 & 25 Vict. c. ccxlii.), intituled "An Act for making a railway to connect Chard and Taunton, in the county of Somerset, and for other purposes." This undertaking was totally unconnected with the Chard Canal Company. The last-mentioned Act contained a clause empowering the

*267] *company thereby created to transfer the undertaking to the Bristol and Exeter Railway Company. A transfer was subse-

quently made, and the new line was constructed by the Bristol and Exeter Railway Company, by means of their own engineer and contractors; the defendant and his friends being altogether removed from any control or participation in the work. No part of the plans and sections prepared by the plaintiff were or could be used in the construction of this line.

The questions raised at the trial were,—first, whether "the Act" mentioned in the writing of the 29th of May meant *an Act for the canal conversion scheme only*, or *any Act for a railway communication between Chard and Taunton*,—secondly, whether the further condition to which the promise contained in the writing of the 28th of May was subject, viz., "provided my friends succeed in carrying out the undertaking," was removed from the agreement by the writing of the 29th, so as to make the promise absolute, in the event of the Act being passed.

Evidence was tendered on the part of the plaintiff, to show that the undertaking which the parties contemplated at the time of entering into the agreement, was, a railway to connect Chard and Taunton, and not merely a railway which should carry out the scheme embraced by the several Acts obtained for the conversion of the Chard Canal into a railway.

On the part of the defendant, it was insisted, that, there being no ambiguity on the face of the agreement, parol evidence was not admissible to explain or vary it.

The evidence, however, was received by his Lordship, and the case went to the jury upon the credit of the witnesses on the one side and on the other; Mr. Bruff stating that he informed Mr. Conybeare of the nature of the difficulties, which arose from the canal *being [*268 heavily mortgaged to Messrs. Fripps, and that he suggested a line (which was that adopted under the Act of 1861) of railway to be formed in case reasonable terms could not be made with Messrs. Fripps; and Mr. Conybeare denying that anything of the kind took place. The jury came to the conclusion that the Act contemplated by the agreement was any Act of Parliament which should enable the promoters to join Chard and Taunton by means of a railway; and accordingly they returned a verdict for the plaintiff, damages 300*l.*

Montagu Chambers, Q. C., in Easter Term last, pursuant to leave reserved, obtained a rule to show cause why a verdict should not be entered for the defendant, or a nonsuit, or why a verdict should not be entered for the defendant on the first, third, fourth, and sixth issues, pursuant to leave reserved, on the grounds,—first, that the agreement stated in the declaration was not proved,—secondly, that the parol and extrinsic evidence admitted to construe the written agreement between the plaintiff and defendant was improperly admitted,—thirdly, that the Act of Parliament mentioned in the agreement was not obtained, —fourthly, that, assuming the parol and extrinsic evidence to have been properly received, the plaintiff was not entitled to recover, as the defendant's friends did not carry out the undertaking.

Bovill, Q. C. and *Needham*, in Trinity Term, showed cause.—The short facts are these:—The plaintiff is an engineer who many years ago was engaged in surveying the line of the Chard Canal with a view to the conversion of the canal or a portion of it into a railway

between Chard and Taunton. Acts of Parliament were obtained for carrying out the proposed undertaking; but it failed, mainly
*269] in consequence of the opposition of Messrs. Fripps, who held a large mortgage upon the canal. In this state of things, the defendant, also an engineer, having some connection in that part of the country, was desirous of forming a railway in the district. Being informed of what the plaintiff had done, the defendant put himself in communication with him, and in the result an agreement was come to between them, the substance of which is, that, in consideration of 600*l.*, the plaintiff would give the defendant the benefit of the plans and sections which he had formerly prepared. The *agreement* between them, it is submitted, consists of the writing of the 29th of May, coupled with that of the 28th, on the one side, and the parol assent on the other. The writing of the 29th makes it clear that the money was to become payable on the obtaining an Act of Parliament for the making of a line of railway from Chard to Taunton, without any reference to the revival of the former abortive scheme. This is clear from the plaintiff's evidence, which the jury believed. But it is said that the agreement must speak for itself, and that parol evidence was not admissible to explain it. But the agreement is wholly unintelligible, as most agreements are, unless light be thrown upon it from the surrounding circumstances. In Taylor on Evidence, s. 1082, it is said: "It may be laid down as a broad and distinct rule of law, that *extrinsic evidence* of every *material fact* which will enable the Court to *ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words, *to identify the persons and things* to which the instrument refers, must of necessity be received. Whatever be the nature of the document under review, the object is to discover the intention of the writer, as evidenced by the words he has used; and,
*270] in order to *do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument." "Again (§ 1083), if the language of the instrument be alike applicable to each of several persons, parcels of land, species of goods, monuments, boundaries, writings, or circumstances; or if the terms be vague and general, or have divers meanings; parol evidence will always be admissible of any *extrinsic circumstances* tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect." In § 1085, the learned author says: "It may, and indeed often does happen, that, in consequence of the surrounding circumstances being proved in evidence, the Courts give to the instrument thus relatively considered an interpretation very different from that which it would have received had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is, not to vary the language employed, but merely to explain the sense in which the writer understood it." Applying those principles here, his Lordship received the evidence offered, not to contradict or vary or control the written instrument, but to enable the Court and jury to apply it to the subject-matter. The evidence showed that the subject-matter about which the parties were contracting, was a scheme for a railway between Chard and

Taunton, not a revival of the old canal line. [WILLES, J.—The Court of Queen's Bench have held that you may show by parol what is meant by "the promissory note," in a written agreement; and the Privy Council have held that parol evidence may be received to show what was meant by "the paper," so as to constitute a will.]

M. Chambers, Q. C., *Lush*, Q. C., and *J. Brown*, in support of the rule.—The agreement had reference, as the heading [*271 shows, entirely to the scheme of turning the Chard Canal into a railway to connect Chard with Taunton. There is no ambiguity, and consequently nothing to explain. Where you have plain and definite expressions in a written instrument, be it a will or a mercantile contract or any other document, you cannot travel out of those expressions to make a new contract for the parties. The plaintiff was to have 600*l.*, in case the defendant with the aid of his friends succeeded in carrying into effect the scheme contemplated by the Acts of 1846, 1847, and 1853. He did not succeed in doing this. The Act obtained was one for making an entirely new and distinct line. Nor was the scheme which was ultimately carried out carried out by the defendant's friends. Both parties are engineers, and both well acquainted with the way in which projects of this sort are promoted. It never could have been contemplated that the defendant should pay this large sum out of his own pocket. The defendant undertakes to pay the plaintiff 600*l.*, provided his friends succeed in carrying out the undertaking. What undertaking? Why, clearly, the undertaking they had been negotiating about, viz. the Chard Canal and Railway scheme. Bruff had a moral claim on the canal conversion scheme: nothing more. The object of the writing of the 29th was, not to interfere with the proviso or condition, but to substitute for the indefinite period mentioned in the second sentence of the writing of the 28th a fixed and definite period for the payment of the money. In Roscoe on Evidence, 10th edit. 24, it is said, that, "where a subject-matter exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be *admitted for the purpose of applying the terms to a [*272 different object." And the same rule is applicable in the case of all other instruments.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the Court:—

In this case the defendant had liberty to move to reverse the verdict which was entered for the plaintiff at the trial, if the Court should hold that the case depended on the construction of the agreement, that the surrounding circumstances were in evidence, and that the defendant's construction was correct.

The plaintiff contended that the defendant's promise to pay 600*l.* became absolute on the passing of "the Act." The defendant contended that his promise was subject to a further condition, viz., "provided his friends succeeded in carrying out the undertaking;" and that this latter condition had not been performed. The jury had to ascertain from the evidence what were the surrounding circumstances when the agreement was made. After that duty was performed, the construction of the writing was for the Judge, and is now for the Court.

The plaintiff's claim arose thus:—An Act had passed in 1846 for

converting the Chard and Taunton Canal into a railway. This Act had been renewed when the time limited for taking land was about to expire. The last Act for renewing this scheme had passed in 1853; and the plaintiff had been the engineer to assist in carrying the bill through Parliament; and the sum now claimed was due to him for his services as engineer on that occasion, and would probably have been paid, either if the undertaking had been carried out under him as engineer, or if he had been employed by the canal company
*273] to assist as engineer in obtaining a *further renewal of that Act, and the undertaking to which it related had been carried out.

The defendant's liability to pay arose thus:—He had formed a scheme for a railway from the British to the Bristol Channel, which would pass near the line from Chard to Taunton. On proposing it to Mr. Domett, who had been one of the solicitors for the Act of 1853, he was informed that time and money would be saved if he as engineer applied to Parliament for a renewal of the Act of 1853; and that, in the event of his so doing, he would be expected to satisfy the claim of the plaintiff, in order that the plaintiff might retire without setting up his rights as the former engineer. On May 28th the plaintiff and defendant met to arrange this claim; and the agreement which we are now to construe was written on that and the next day.

On the same 28th of May, the defendant wrote out and sent to the plaintiff what he understood to be the effect of the arrangement, in substance, as follows:—"Chard Canal and Railway Company. In consideration of your transferring all your interest in this Company and handing to me the papers, I agree to pay you 600*l.*, provided my friends succeed in carrying out the undertaking. The 600*l.* to be paid as follows,—300*l.* on acquiring the first portion of land required by the Company, and the balance out of the first three payments received by me on the foot of construction account."

On the 29th, the plaintiff and defendant again met, and the plaintiff objected that the writing before mentioned did not express what he had intended; and, after discussion, the defendant wrote, at the plaintiff's suggestion, across the first writing, in effect what follows:—"It is understood that the 600*l.* herein referred to is to become
*274] payable on the obtaining of *the Act, one moiety within six months, and the residue in three annual instalments."

Thus was formed the written agreement now in question.

The subsequent facts are, that the defendant abandoned the canal conversion scheme as impracticable, and afterwards, as engineer, assisted in obtaining an Act for a line unconnected with the canal and for a company unconnected with the canal company.

In this Act was a clause empowering the directors to transfer the undertaking to the Bristol and Exeter Railway Company. The transfer was made. That Company carried out the undertaking by their own engineer, contractors, and funds. The defendant was displaced as engineer: after which neither he nor his friends had any connection with the carrying out of the undertaking.

Upon the trial of this action to recover 300*l.*, the first moiety of the 600*l.*, the two main questions were,—first, whether the Act mentioned in the writing of the 29th of May meant "an Act for the canal con-

version scheme only," or "any Act for a railway communication between the two towns,"—secondly, whether the further condition to which the promise was subject in the writing of the 28th of May, was removed from the agreement by the writing of the 29th, so as to make the promise absolute, in the event of the Act being passed.

Evidence was tendered for the plaintiff, and objected to by the defendant, and admitted by the Judge. The principles which govern are not disputed. It is clear that evidence of the surrounding circumstances is admissible. Also it is clear, that, if the evidence raises a latent ambiguity, evidence is admissible to explain it.

The plaintiff contended that the evidence showed that there might be two Acts, either of which might be *designated by the [*275 words "the Act" in the writing of the 29th of May; and so it raised a latent ambiguity; and, if so, evidence to explain the intention of the parties was admissible. Upon this principle the Judge received evidence of the conversations between the plaintiff and the defendant before the writing was made.

If the evidence raised a latent ambiguity, this evidence was properly admitted; and, if the decision of the jury in believing the plaintiff rather than the defendant was correct, the intention of the parties in using the words "the Act" was as the plaintiff contended. On the other hand, if there was no latent ambiguity, and the evidence was therefore not admissible, the admission thereof is no ground for a new trial, because the writing would then be for the Court to construe, without regard to the evidence; and, if the Court thought that the defendant's construction was correct, they would have power to decide in his favour now, without regard to the finding of the jury upon inadmissible evidence,—this evidence being admitted solely for the purpose of explaining the supposed latent ambiguity, not for the purpose of altering or controlling the words of the writing in any degree.

It is not necessary to consider farther the rights of the parties in respect of the first question relating to the meaning of the words "the Act;" because, on the second question, we are of opinion that the defendant's promise to pay contained in the writing of the 29th of May remained subject to the condition contained in the writing of the 28th, viz., "provided his friends succeeded in carrying out the undertaking;" and that such condition has not been fulfilled.

The writing of the 28th must be taken with that of the 29th; and effect must be given to both as far as *they are consistent with [*276 each other. The two conjoined constitute the agreement.

The evidence of surrounding circumstances showed that both parties were railway engineers, conversant with assisting in carrying railway bills through Parliament, and aware that remuneration often depended on the carrying out of the undertaking.

Mr. Bruff's remuneration had failed because the undertaking of 1853 was not carried out, and Mr. Conybeare promised to pay Mr. Bruff, provided his friends succeeded in carrying out that which was then proposed.

It is not necessary to fix precisely whether the defendant meant that the undertaking must be a line taken by a contractor acting with the defendant as engineer. It is enough for us to be assured that he did

not intend by the writing of the 28th of May to bind himself to pay out of his own money; and that intention is clearly expressed in the instrument as to the second 300*l.*; for, it is promised to be paid out of the first three payments made to the defendant on the foot of construction account. It is clear from these words, with the circumstances, that the defendant meant to be liable only in case he was engineer for the line, receiving payments on construction account. Also, it is probable that he would so stipulate. If Mr. Bruff's claim was a charge on the company under the Act of 1853, the defendant, taking up that undertaking in the place of Mr. Bruff, might justly agree to pay out of the funds of the continuing company a fair charge on their funds due under the former Act: but it would be imprudent for him to risk his own money to pay off such a claim, and dishonest in him if he meant to be personally liable to Mr. Bruff, and to apply the funds of a new company to indemnify himself against such a liability.

*277] *The promise in the writing of the 28th of May is subject to this condition, and also at the same time the payment is not to be due until land shall be taken or payments made on construction account.

Then, what is the effect of the writing of the 29th? It appears to us to substitute the passing of the Act as the fact after which the payments are to become due, instead of the acquiring land or the receiving payments on construction account; and, subject to that alteration, the writing of the 28th remains in full force: the promise therein is on the condition "that the friends of the defendant succeeded in carrying out the undertaking;" and this condition has been in no sense fulfilled, because, as before is said, the Bristol and Exeter Railway Company took the new line to themselves, and in a manner dismissed Mr. Conybeare from being engineer, and prevented the contractors whom he looked to for the making of the line from having anything to do with the work.

Our judgment, therefore, is for the defendant.

This judgment is founded on the construction of the writing. The evidence shows that the parties intended to put their agreement in writing, and did so. It follows that we ought not to give any effect to those parts of the oral evidence which tend to contradict or control the written words. Rule absolute.

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*278] *LEVERSON and Another *v.* LANE and Another.
Nov. 7.

One who takes from a member of a trading firm, in satisfaction of his separate debt, a negotiable security in the name of the partnership, is bound to show that it was accepted or endorsed with the concurrence of the other partners. Ripley *v.* Taylor, 1 East 175, distinguished.

THIS was an action upon a bill of exchange for 184*l.* 6*s.* 3*d.*, drawn by the plaintiffs upon and purporting to be accepted by Sterne & Lane, who carried on business in partnership as steam wheel manufacturers.

The defendant Sterne suffered judgment to go by default, and the defendant Lane pleaded, amongst other pleas, that he did not accept.

The cause was tried before Erle, C. J., at the sittings in London after the last Hilary Term, when the following facts appeared in evidence:—The partnership of Sterne & Lane commenced in the early part of the year 1861; and, in January or February, 1862, a bill was filed by Lane for a dissolution and account. In June, 1861, Sterne, for the purpose of raising capital to carry on the business, bought diamonds of the plaintiffs to the amount of 561*l.*, which he immediately pledged for 407*l.*, bringing that sum into the business. This was entirely Sterne's separate transaction; and, Lane refusing to allow him to use the name of the firm, Sterne gave the plaintiffs two acceptances in his own name of 280*l.* 10*s.* each for the price of the diamonds, one of which became due on the 20th of September and the other on the 30th of December, 1861. When the first of these bills arrived at maturity, Lane, at Sterne's request,—but, as Lane swore, not conceiving that he was thereby discharging any liability of his own, but simply with a view to assist Sterne,—gave the latter a letter authorizing their bankers, Messrs. Martin & Co., to pay the bill; and, in order to raise money to meet it, he joined Sterne in a bill for 120*l.*, which they procured to be discounted, and which *was afterwards paid. When the second bill became due, Sterne, in part [*279
satisfaction of it, gave the plaintiffs the bill now sued upon, which was accepted by him in the name of the firm, but without any authority from Lane.

The Lord Chief Justice, in the course of his summing up, told the jury, that, if one partner gave the acceptance of the firm in discharge of his own separate debt, the presumption was that he did so without the authority of his copartner, and that it lay upon the person who took the security to show that it was given with the authority of the other partner.

The jury having returned a verdict for the defendants,

Bovill, Q. C., now moved for a new trial on the ground of misdirection, and also upon affidavits. He submitted, mainly upon the authority of Ripley *v.* Taylor, 13 East 175, that the Lord Chief Justice misdirected the jury in telling them that it lay upon the plaintiffs to show that the bill in question was accepted in the partnership name with the authority of Lane. In that case, the plaintiffs had sold to Ewbank (who carried on business in partnership with Ord as linendrapers) a cargo of coals for 34*l.* 11*s.*, receiving from Ewbank 5*l.* on account, and his promissory note for the balance. This note was dishonoured, and Ewbank afterwards gave the plaintiffs in lieu of it a bill for 40*l.* (the bill sued upon) drawn by Ewbank in the name of the firm of Ord & Ewbank upon Taylor, and endorsed "Ord & Ewbank." The question was whether this could be properly treated as a bill drawn by the firm. Lord Ellenborough, in the course of the argument, there says: "Primâ facie one partner is bound by the endorsement of another in the partnership firm; but the presumption may be cut down by showing collusion." And afterwards, in giving *judgment, he says: "If this were distinctly the case of a [*280
pledging by one partner of a partnership security for his own separate debt without the authority of the other partner, or if there existed in this case *evident covin* between one partner and the holder of the partnership security upon which the action is brought, in order

to charge the other partner without his knowledge or consent, either express or implied, for the private advantage of the parties to such covinous agreement, we should have no hesitation to pronounce a bill drawn and endorsed under such circumstances void in the hands of the covinous holders, upon the principle laid down in the case of Sheriff *v.* Wilks, 1 East 48. But, upon the facts stated, such does not distinctly appear to us to be the case. Nor does it appear that there was any such crassa negligentia on the part of the plaintiffs, in not inquiring whether Ewbank, the one partner with whom they dealt, was authorized to dispose of this security (which had originally been partnership property) as his own, as to render this transaction on that account fraudulent, and therefore void." And, after stating the facts of Sheriff *v.* Wilks, he proceeds: "This bill had an existence, according to its apparent date, eighteen days before the time of its delivery to the plaintiffs: it was drawn for a sum considerably exceeding the debt, and was not only drawn and endorsed, but accepted also, before it was produced to them: and, although it is stated in the case that in fact the bill was drawn and endorsed by Ewbank in the partnership firm, it does not appear that the plaintiffs knew that it was drawn and endorsed by *him*. Under these circumstances, it might reasonably be supposed by the party to whom it was given to be a partnership security of which Ewbank, the partner in possession of it, had for some valuable consideration, or in virtue of some arrangement with Ord the other
*281] *partner, become the proprietor, so as to be authorized to deal with it as his own. At any rate the contrary does not either actually or presumptively appear. And it seems to us, in order to deprive the plaintiffs of the benefit of such a security in a case which admits of positive proof to the contrary, that the contrary should appear; and that either actual covin should be shown, or that at least more pregnant evidence to induce that conclusion should have been given on the part of the defendant than is disclosed upon the facts of this case." The law is thus stated in Chitty on Bills, 10th edit. 35,— "The mere circumstance of a bill being given for an antecedent debt due from one only of the parties raises a presumption that the creditor knew that the bill was given without the concurrence of the other partners; and in Ex parte Goulding, 2 Gl. & J. 118, the Vice-Chancellor said: 'After an attentive consideration of the several authorities, I am of opinion, that, when one partner gives the acceptance of the firm in payment of his separate debt, without authority from his copartner, such acceptance does not bind the firm.' So, in an action on a bill against three acceptors, by the endorsee, where it appeared that the defendants were partners in a tea speculation, and that the drawer, a wine merchant, drew in payment for wine delivered to one of the three, the Judge directed the jury, that, if they found that the bill was so drawn without the knowledge and consent of the other two defendants, they were not liable; and the jury found for the defendant (Wood *v.* Holbeck, Cor. Abbott, C. J., May 28, 1826, at Guildhall). And from the cases of Sheriff *v.* Wilks, 1 East 48, and Green *v.* Deakin, 2 Stark. 347, it has been inferred by a learned text-writer (Bayley on Bills, 5th edit. 59), that, if one partner accept in the partnership name a bill drawn on the firm by his own separate

creditor for his separate debt, or if for *such separate debt he give a promissory note in the name of the firm, it lies upon [*282 the creditor to show that his debtor had authority to give him the joint security of the firm, and that primâ facie the transaction is fraudulent on the part of both debtor and creditor. *But, as a partner may in his individual capacity have a claim upon the firm in respect of which he might draw, accept, or endorse a bill in the name of the firm, it has in other cases been considered that the mere circumstance of the party to whom he delivers it knowing that he was using it for his private benefit, does not of itself necessarily afford sufficient presumptive evidence of collusion to invalidate the transaction; and that the partner objecting to liability must prove facts sufficient to warrant a jury in finding that the partner really acted fraudulently, and that the holder had notice of the fraud,*"—citing Ex parte Bonbonus, 8 Ves. 542, 544, Houldsitch *v.* Nias, 8 Price 689, Henderson *v.* Wild, 2 Campb. 561, Ridley *v.* Taylor, 13 East 175, and per Bayley, J., in Wintle *v.* Crowther, 1 C. & J. 306.† [KEATING, J.—In Smith's Mercantile Law, 5th edit., p. 44, the law is broadly laid down in terms which precisely sustain my Lord's summing up,—"It would seem that the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself, is *a badge of fraud*, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove, by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so."] In Byles on Bills, 8th edit. 42, it is said, that, "even if a partner exceed his authority, and pledge the partnership credit on a negotiable security for his own private advantage, his copartners are liable to a holder for value without notice." The *learned author goes on to say [*283 (p. 43) that "the taking a joint security for a separate debt raises a presumption that the creditor knew that it was given without the concurrence of the other partners;" for which he cites Richmond *v.* Heapy, 1 Stark. N. P. C. 202 (E. C. L. R. vol. 2), Arden *v.* Sharpe, 2 Esp. N. P. C. 524, Barber *v.* Backhouse, Peake N. P. C. 61, Wallace *v.* Kellsall, 7 M. & W. 264,† Jones *v.* Yates, 9 B. & C. 532 (E. C. L. R. vol. 17), 4 M. & R. 613, Jacaud *v.* French, 12 East 317, Gordon *v.* Ellis, 7 M. & G. 607 (E. C. L. R. vol. 49), 8 Scott N. R. 290. But the learned author does not question the authority of Ripley *v.* Taylor, 13 East, 175. [BYLES, J., referred to Musgrave *v.* Drake, 5 Q. B. 185 (E. C. L. R. vol. 48). WILLIAMS, J.—Mr. Justice Bayley lays down the rule pretty much as it is laid down by my brother Byles. He says (Bayley on Bills 34),—"The taking a joint security for a separate debt raises a presumption that the creditor knew that it was given without the concurrence of the other partners:" in support of which he refers to Ex parte Bonbonus, 8 Ves. 540, Wells *v.* Markham, 2 Esp. N. P. C. 731, Green *v.* Deakin, 2 Stark. N. P. C. 347 (E. C. L. R. vol. 3), and Ex parte Gouldney, 2 Gl. & J. 118.

He then proceeded to observe upon the facts and the allegations in the affidavits.

WILLIAMS, J.—As to the first point, viz., that the verdict is unsatisfactory by reason of the matters disclosed in the affidavits, we will take time to consider and to read my Lord's notes. But, as to the

supposed misdirection, I think there is no ground whatever to doubt that the summing up was perfectly correct. I do not mean to deny that there is in the judgment of Lord Ellenborough in Ridley v. Taylor, 13 East 175, a dictum which is to some extent inconsistent with the law as laid down in this case. But that dictum is clearly at variance
*284] with all the authorities both before *and since that judgment. I conceive the law as it has been established for very many years to be correctly laid down in the last edition of Byles on Bills (8th edit.), where, after stating generally at p. 42, that "even if a partner exceed his authority, and pledge the partnership credit on a negotiable security for his own private advantage, his copartners are liable to a holder for value without notice," the learned author goes on at p. 43 to say,—"But the taking a joint security for a separate debt raises a presumption that the creditor knew that it was given without the concurrence of the other partners." It was in accordance with the law as thus laid down that this case was left by the Chief Justice to the jury: and that is supported by several authorities. It is only necessary to advert to one or two of these. In Ex parte Bonbonus, 8 Ves. 540, 542, Lord Eldon says: "This petition is presented upon a principle which it is very difficult to maintain, that, if a partner for his own accommodation pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound." And further he goes on to say: "I agree, if it is manifest to the persons advancing the money that it is upon the separate account, and so that it is against good faith that he should pledge the partnership, then they should show that he had authority to bind the partnership." And in Frankland v. M'Gusty, 1 Knapp P. C. 274, Sir John Leach, M. R., says: "I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor who takes a partnership security for the payment of his separate debt, if it be taken simpliciter, and there is nothing more in the case, to prove that it was given with the consent of the other partners." It is plain here, that, at the time the plaintiffs took the bill in question, they were perfectly
*285] aware that it was given in *satisfaction of an overdue acceptance of Sterne's for a matter in which the firm had no interest whatever. The case, therefore, falls within the rule that one who takes a negotiable security under such circumstances is bound to show affirmatively that the person from whom he took it had the authority of his copartners to pledge the credit of the firm. This was, in substance and effect, what my Lord laid down to the jury at the trial; and I see no ground whatever for objecting to it.

BYLES, J.—I am of the same opinion. I adopt the law as laid down in a text-book of very great value,—Smith's Mercantile Law,—where I think it is correctly laid down (p. 44), and evidently well considered, and after reading Lord Ellenborough's judgment in Ridley v. Taylor, 13 East 175. "It would seem," says the learned author, "that the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove, by showing either that the partner from whom he received it acted under the authority of the rest, or at least

that he himself had reason to believe so." The direction of my Lord was in accordance with the view taken by Mr. Smith. I agree with all that has been said by my Brother Williams; and I think we should be most unjustifiably unsettling the law if we were to grant a rule upon this ground.

KEATING, J.—I am of the same opinion. No doubt the dictum of Lord Ellenborough in Ripley *v.* Taylor favours the view presented by Mr. *Bovill:* but that dictum must be taken with the qualification stated in *Smith's Mercantile Law, Bayley on Bills, and Byles on Bills. There was no proof that the plaintiff in that case [*286 knew that Ewbank's was the hand by which the bill was drawn. There is that great distinction between that case and the present. I entirely agree with the rest of the Court that no doubt ought to be thrown upon this matter.

ERLE, C. J., concurred; and, on the following day,

WILLIAMS, J., said the Court had read the notes of the trial, together with some additional evidence adverted to in the affidavit produced in support of the motion, and were of opinion that there was nothing to warrant them in disturbing the verdict. Rule refused.

In re SARAH PRICE. *Nov.* 15.

The Court will not permit a married woman to execute a conveyance under the 3 & 4 W. 4, c. 74, s. 91, without the concurrence of her husband (he having refused to concur), upon an affidavit merely stating that the wife had left her husband in consequence of his violence, and was living apart from him.

LOPES moved for a rule to enable Mrs. Price to convey certain property to which she was entitled, pursuant to the 91st section of the 3 & 4 Vict. c. 74, without the concurrence of her husband. The affidavit on which he moved stated that the parties were married in the year 1853, and lived together until 1861, when, in consequence of the husband's violence and brutality towards her, *the wife had been compelled to leave him,* and had ever since resided with her brother; that the wife was entitled to the property in question (worth about 100*l.*) under the will of her father; and that the husband (who had a life-interest in it) had been applied to to join in the conveyance, *but refused to do so unless the purchase-money was paid to him. [ERLE, C. J.—The parties are not living apart either by [*287 mutual consent, or by sentence of divorce, or in consequence of the husband's being transported beyond the seas. The wife has absented herself from her husband by her own voluntary act. She says she was "compelled to leave him:" but we cannot take that as proved. How do you bring the case within the statute?] The words of the 91st section are very large,—"If a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed or of making a surrender of lands held by copy of Court-roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his

being transported beyond the seas, *or from any other cause whatsoever*, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this Act or otherwise." In the case of In re Sarah Woodcock, 1 C. B. 437, the Court dispensed with the concurrence of the husband, where it was shown that the husband refused to join in the execution of the conveyance unless part of the purchase-money was paid to him.(*a*)

ERLE, C. J.—In the case referred to, the parties were separated by mutual consent. Here, the wife has *absented herself from her husband without his consent, and without any legal proof *288] before us of the necessity for such a step. Besides, it appears that the husband has a life-interest in the property. How can we take upon ourselves to deal with his rights without hearing him?

The rest of the Court concurring, *Lopes* took nothing.(*b*)

(*a*) And see In re Perrin, 14 C. B. 420 (E. C. L. R. vol. 78).

(*b*) The motion was subsequently renewed, upon an affidavit stating in direct terms that *the husband had deserted his wife and family*, and a rule was granted.

In the Matter of GEORGE THOMPSON. *Nov.* 15.

Where an attorney was convicted of embezzlement, and sentenced to seven years' penal servitude, in July, 1861, an application to strike him off the roll was held not to be too late in Michaelmas Term, 1862.

The rule for that purpose may be served upon the prisoner.

GARTH, on behalf of the Incorporated Law Society, on a former day in this term, obtained a rule calling upon George Thompson, one of the attorneys of this Court, to show cause why he should not be struck off the roll of attorneys, on the ground that he had been convicted of embezzlement. It appeared from the affidavits on which the motion was founded, that Mr. Thompson was convicted in July, 1861, was sentenced to seven years' penal servitude, and was now undergoing his sentence at Portland,—at which place the rule was served upon him.

Campbell Foster, who was instructed by the friends of the party, objected that the service of the rule upon a convicted felon whilst under sentence was nugatory, he being civiliter mortuus. [ERLE, C. J.—You appear *for him.] It is not competent to a man so circumstanced to appear either in person or by counsel. [ERLE, *289] C. J.—Nobody objects to your appearing for him; and we shall not do so.] Then, the application is too late: it should have been made within one or at the most two terms after the conviction took place. In an Anonymous case, 2 B. & Ad. 766 (E. C. L. R. vol. 22), it was held that a motion to strike an attorney off the roll, on the ground of misconduct and the want of regular service in his clerkship, comes too late when the party has been three years and a half admitted,—the Court saying that the application should have been made very

shortly, as, "a month or two, or a term or two after the admission." So, in Garry *v.* Wilks, 2 Dowl. P. C. 649, where an attorney was charged with oppression towards his client, but the application was not made till after three terms had nearly elapsed, and no attempt was made to explain the delay, it was held that the motion was too late.(*a*) [KEATING, J.—Those were not cases in which the party had been convicted of an indictable offence. ERLE, C. J.—We are to exercise our discretion. This man has been guilty of a very aggravated offence.] No doubt this unfortunate young man was properly convicted. He is about to be sent to Western Australia, where he hopes to redeem his character and reinstate himself in his proper position in society. If he be struck off the roll here, he will be deprived of the chance of doing this by the practice of his profession in the colony.

Garth was not called upon.

*ERLE, C. J.—There is no ground for the opposition to this rule on the score of lateness. And I regret to say that I do [*290 not feel justified in yielding to the appeal which has been made to our compassion on the respondent's behalf. If he is sent to Australia, he may still by his good conduct obtain credit and reinstate himself: and possibly the authorities there may, after a proper period of probation, permit him to resume the exercise of the profession to which he has been brought up; but they alone are the persons to whom the application must be made.

The rest of the Court concurring, Rule absolute.(*b*)

(*a*) And see Rex *v.* Walsh, 1 Jurist 559. It was there held, that, where twelve months have elapsed from the time of an attorney's admission, the Court will discharge a rule for striking him off the roll, although it be sworn that there was no service whatever under articles.

(*b*) See In re Garbett, 18 C. B. 403 (E. C. L. R. vol. 86), and the authorities there cited.

THE THREE TOWNS BRITISH MUTUAL DEPOSIT AND LOAN SOCIETY (Limited) *v.* DOYLE and Others. *Nov.* 4.

By the condition of a bond, the obligor was to pay the money by monthly instalments, and "when and as often as he should make default in the payment of any of the said monthly instalments, he should pay to the obligees 1*s.* *in the pound for each and every pound* of the said instalment so left unpaid:"—Held, that the obligees were not entitled to anything in respect of fractional parts of a pound.

THIS was an action upon a bond given by the defendants to secure money advanced on loan by the society. The cause was tried on the 27th of September, 1862, before the Judge of the East Stonehouse County Court.

By the terms of the bond, the money advanced was to be repaid by monthly instalments of 27*s.* each. The bond contained a condition, that, "when and so often as [the obligor] should make default in the payment of any of the said monthly instalments, he should pay to the said society 1*s.* in the pound for *each and every pound [*291 of the said instalment so left unpaid."

The plaintiffs claimed 1*s.* in the pound for each month during which the instalment remained unpaid, and also a proportional part of 1*s.* in respect of each fractional part of a pound.

The Judge of the County Court decided that the plaintiffs were entitled to 1*s.* for the month in which the default took place for each pound, but no more, and to nothing for the fractional parts of a pound. He accordingly gave judgment for the plaintiffs for 21*l.*, reserving leave to them to move to increase the damages to 22*l.* 17*s.* 6*d.*, if the Court should be of opinion that his construction of the condition was erroneous.

Thrupp now moved accordingly.—He submitted that the stipulated payment was in the nature of interest, and therefore must be governed by the rule which prevails as to interest, which is payable rateably in respect of fractional parts of the principal sum.

ERLE, C. J.—I am of opinion that the decision of the County Court Judge was right. The plaintiffs are by the terms of the condition entitled to 1*s.* for every default, but not to a proportional part of 1*s.* for the fractions. The words are, that, when and so often as the obligor shall make default in the payment of any of the said monthly instalments, he shall pay to the society 1*s.* *in the pound for each and every pound* of the said instalment so left unpaid,—not "at the rate of 1*s.* in the pound."

The rest of the Court concurring, Rule refused.

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*292] *WAY *v.* HEARN. *June* 4.

At the request of the defendant, the plaintiff accepted a bill for 110*l.*, dated the 25th of October, 1859, and drawn by one Read, for the purpose of raising funds to relieve the latter from an execution; the defendant at the same time giving the plaintiff the following undertaking,—"You having lent your name to Mr. Read on a bill for 110*l.*, payable three months from this date, the proceeds to be applied to the discharge of the amount payable to the sheriff, I undertake to share with you any loss or liability you may incur in respect of such bill."

Prior to this transaction, Read, finding himself in a state of great embarrassment, had applied to the defendant (who was his attorney) for advice; and, at the suggestion of the latter, an accountant was employed to prepare a statement of Read's affairs, to be laid before a meeting of his creditors. The plaintiff assisted the accountant in preparing this statement, and at his desire (in order, as he stated, that his imprudence might not come to the knowledge of his wife), the fact of Read being indebted to him to the extent of 2000*l.* for money lent was kept out of the statement, and altogether suppressed:—

Held, that,—the contract being one of indemnity and not of suretyship,—although the plaintiff knew that the defendant, when he agreed to be responsible for half the 110*l.*, was influenced by the impression that the balance-sheet contained a true statement of Read's affairs, he was entitled to recover from the defendant one-half of the loss entailed upon him by that transaction,—the jury having negatived fraud.

Held also, that the position of the defendant was not altered by the fact that the bill in respect of which the indemnity was given had been several times renewed without the knowledge or consent of the defendant.

THIS was an action in substance for not indemnifying the plaintiff against a responsibility which he had incurred at the request of the defendant.

The first count of the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would lend his name to one Robert Read on a bill of exchange for 110*l.* payable three months after the 24th of October, 1859, that is to say, by the plaintiff accepting the said bill, the proceeds thereof to be applied in discharge of a certain amount then payable to the sheriff of Hampshire, the defend-

ant undertook and promised the plaintiff to share with him any loss or liability which he the plaintiff might incur in respect of such bill; and that, although the plaintiff did then lend his name to the said Robert Read on the said bill, and then accepted the same for the purpose and on the terms aforesaid, and the proceeds of the said bill were applied in discharge of the said amount so payable to the said sheriff as aforesaid, and the plaintiff afterwards did incur a certain loss or liability in respect of the said bill, by being compelled to pay and paying the amount thereof, that is to say, *110*l.*, in discharge and in respect of the same, and all things had happened and been [*293 done and performed, and all times had elapsed, which were necessary to have happened and to have been done and performed and to have elapsed to entitle the plaintiff to have the defendant share with him the said loss or liability, and to be paid by the defendant one moiety of the said sum of 110*l.*, and to maintain the action, yet the defendant did not nor would share with the plaintiff the said loss or liability or pay him a moiety of the said sum of 110*l.* or any part thereof.

There was also a count for money payable by the defendant to the plaintiff for money paid by the plaintiff for the defendant at his request, and for money found due from the defendant to the plaintiff upon accounts stated between them. Claim, 60*l.*

The defendant pleaded,—first, to the first count, that he did not undertake and promise as therein alleged,—secondly, to the first count, that the plaintiff did not incur a loss or liability as in that count alleged,—thirdly, to the first count, that, before action, the plaintiff's claim was satisfied and discharged by payment,—fourthly, to the first count, that the supposed promise in that count mentioned was procured from him by the plaintiff and one Robert Read in collusion with him, by fraud and misrepresentation,—fifthly, to the residue of the declaration, never indebted.(*a*)

Issues were joined upon these pleas, and the cause *was tried before Byles, J., at the sittings in London after last [*294 Hilary Term, when the following appeared to be the facts of the case:—The plaintiff is a retired tradesman residing at Newport, in the Isle of Wight: the defendant is an attorney there and at Ryde. The plaintiff was an intimate friend and the defendant the legal adviser of one Robert Read, who carried on the business of a tailor and outfitter at Newport. In the year 1859, Read was in great pecuniary difficulties, and, acting under the advice of Mr. Hearn, he, in September in that year, employed Messrs. Parrington & Ladbury, accountants in London, to prepare a statement of his affairs to lay before his creditors upon an application to be made to them for time. Messrs. Parrington & Ladbury accordingly sent one Lucas to Newport for that purpose; and in the course of a few days Lucas had prepared a statement showing a balance in Read's favour of about 2000*l.*, after payment of all his debts. Whilst Lucas was preparing this account, Way was in the habit of calling daily at Read's, assisting

(*a*) There was also a plea setting up a defence on equitable grounds, upon which the Court in Hilary Term last, gave judgment for the plaintiff,—holding that the defendant's liability upon his undertaking was not discharged by the renewal of the bill, the parties not standing in the position of creditor and principal and surety: vide, 11 C. B. N. S. 774 (E. C. L. R. vol. 103).

Lucas in taking the stock, and was perfectly cognisant of all that was being done.

On Saturday the 22d of October, 1859, an execution was levied upon Read's effects. Read applied to Way to assist him in this emergency; and Way on the 24th went to Ryde to consult Mr. Hearn, and ultimately it was proposed that Way should become surety to the National Provincial Bank for half the amount required to pay out the sheriff (110*l.*), and Hearn for the other half: and, in pursuance of this arrangement, a bill for that amount was drawn by Read upon and accepted by Way, and handed to the bank,—the defendant Hearn giving the plaintiff Way a letter of guarantee in the following terms:—

"24th October, 1859.

*295] "My dear Sir,—You having lent your name to Mr. *Read on a bill for 110*l.* payable three months from this date, the proceeds to be applied to the discharge of the amount payable to the sheriff, I undertake to share with you any loss or liability you may incur in respect of such bill. "J. H. HEARN."

The bill (which was dated the 25th of October) was not paid at maturity, but was renewed four different times, the interest only and 15*l.* of the principal being paid in the interim. The last renewal was by a bill for 95*l.* drawn on the 4th of February, 1861, by Way upon Read, payable three months after date, and was met by Way. The arrangements for these renewals were made by Way and Read with the bank, without the knowledge of Hearn.

At the time these transactions took place, Read was indebted to Way in the sum of 2000*l.* for money lent. This fact was not mentioned to Hearn, nor did the debt appear on the face of the statement submitted to Read's creditors; Way's reason for the concealment being that he did not wish his wife to know that he had been so imprudent as to lend so large a sum without security. No actual representation, however, was made either by Way or by Read that no debt existed between them; but Way and Read well knew that Hearn was ignorant of the existence of this debt, and that he would not have incurred the liability if he had known of it.

On the part of the defendant, it was objected, that the guarantee was bad in law, being given for a past consideration,—that no loss or liability had accrued in respect of any bill of exchange dated the 24th of October, 1859, or in respect of the bill to which the guarantee related,—that the plaintiff never accepted any bill for 110*l.* drawn by Read, as alleged in the declaration,—that the loss and liability (if *296] any) could *not be ascertained until Read's estate had been administered and fully realized,—that the guarantee was obtained by the plaintiff by fraud and concealment of facts,—and that the plaintiff was prevented, by his own laches, from recovering from the defendant.

An attempt was made to prove a *statement* by Way to Hearn that no debt was due to him from Read: but the jury negatived that; and they found, in answer to a question put to them, that the acceptance of Way was originally given to the bank at the request of Hearn.

A verdict having been found for the plaintiff, damages 47*l.* 10*s.*,

Karslake, Q. C., in Easter Term last obtained a rule nisi to enter a verdict for the defendant, pursuant to leave reserved, on the grounds "that, on the facts proved, with the inferences to be drawn therefrom, no such bill was given as that stipulated for and mentioned in the declaration; that the bill given to the bank was discharged at maturity; that no loss or liability was incurred by the plaintiff on such bill; and that the promises were obtained by fraud, as alleged in the fourth plea."

Coleridge, Q. C., and *Hall*, in Trinity Term, showed cause.—This is not a case of principal and surety, but a contract of indemnity. At the request of Hearn, Way consented to become surety for an advance upon a bill of exchange for 110*l.* from the National Provincial Bank to Read; and, in consideration of his so doing, Hearn undertook to indemnify Way to the extent of one moiety against any loss or liability he (Way) might incur in the transaction. The plaintiff has sustained a loss by being called upon to pay the bank 95*l.*; and he is entitled to call upon the defendant to reimburse *him to the extent of half that loss. The plaintiff has been guilty of neither legal nor moral fraud, nor of laches. [BYLES, [*297 J.—In the case of suretyship, it is intended that the surety should go scot-free; but here Hearn was intended to bear half the loss. He has not any of the equities of a surety.] It is said that there was no such bill as that mentioned in the guarantee. But the Court will look at the substance of the transaction and the fair meaning of the parties, and see whether, notwithstanding the renewals of the bill, there has not been such a loss as the guarantee contemplated. If this had been a simple case of suretyship, it may be that the non-communication by Way to Hearn of the existence of the debt from Read to him would, upon the principle laid down by the House of Lords in Railton *v.* Mathews, 10 Clark & F. 934, have discharged the surety. But that principle does not apply to cases of indemnity. And, even in the case of a surety, it was held, in Hamilton *v.* Watson, 12 Clark & F. 109, that he is not of necessity entitled to receive, without inquiry, from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party: but, if he requires to know any particular matter of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry: unless, indeed, there be actual fraud: Owen *v.* Homan, 4 House of Lords' Cases 997. In The North British Insurance Company *v.* Lloyd, 10 Exch. 523,† it was held that the rule which prevails in assurances upon ships and lives, that all material circumstances known to the assured must be disclosed, though there be no fraud in the concealment, does not extend to the case of guarantees; but that, in the latter case, the concealment, to vitiate the guarantee, must be fraudulent. And this doctrine is affirmed by Lord *Cottenham, C., in Wythes *v.* Labouchere, 5 Jurist, N. S. 499, 502, where he says: "The case of [*298 The North British Insurance Company *v.* Lloyd expressly decides that the obligation of a creditor to communicate even material circumstances which are known to him, is not co-extensive with the rule which prevails in insurance on ships and lives, and that, unless the non-disclosure amounts to fraud on the surety, he is not entitled to

relief. The concealment must be of some material part of the transaction itself between the creditor and his debtor to which the suretyship relates. The creditor is under no obligation to inform the intended surety of matters affecting the credit of the debtor, or any circumstances unconnected with the transaction in which he was about to engage, which were calculated to render his position more hazardous. As Lord Campbell said, in Hamilton *v.* Watson, 'If the rule was, that everything should be disclosed by the creditor which it was material for the surety to know, it would be indispensably necessary for bankers to whom the security was to be given, to state how the account had been kept, whether the debtor was in the habit of overdrawing, and whether he was punctual in his dealings, and whether he performed his promises in an honourable manner; for, all these things are extremely material for the surety to know.' It is unnecessary to go through the authorities to show that in all those cases in which the question of concealment arose, it related to the transaction itself, and amounted to a fraud upon the surety. That will sufficiently appear by the judgment of the Court of Exchequer in the case to which I have already referred." The rule deducible from all the cases, is, that, where fraud is found, reticence is as much a discharge of the surety as direct falsehood would be; but that, where there is
*299] no fraud, the mere *omission to communicate a circumstance the knowledge of which might have influenced the party's mind if conveyed to him, does not vitiate the contract. [WILLES, J. —Generally speaking, it is for the surety to inquire.]

Karslake, Q. C., in support of his rule.—The defendant is entitled to a verdict on all or one of the three grounds stated in the rule. 1. The defendant agreed to become liable on a bill payable at three months from the 24th of October, 1859. There never was any such bill. [ERLE, C. J.—The bill was given on the 25th. It was all one transaction. It was never suggested that there was any other bill. BYLES, J.—Hearn contracts to pay his own debt. He says in effect to Way,—"Lend you the money to Read, and I will repay you one-half."] It never was a debt due from Hearn to Way. Green *v.* Creswell, 10 Ad. & E. 453 (E. C. L. R. vol. 37), 2 P. & D. 430, is an authority to show that this was a guarantee for the debt of a third person. Read was the person primarily liable; the object was to guaranty the bank. 2. The bill given to secure the advance was to be payable in January, 1860, because it was supposed that Read would then be in a position to pay it. Hearn gave his indemnity on the faith that Read would be called upon to pay it at maturity. That bill was withdrawn without Hearn's consent, and renewed ones given for it. Instead of allowing Read to apply his funds to the payment of this bill, the plaintiff allows him to part with them in other directions, probably in part discharge of his own debt, and then he turns round upon the indemnifying party. 3. At all events there was such an amount of concealment as to constitute fraud in law. It was substantially a case of active and aggressive fraud on the part of the plaintiff. [WILLIAMS,
*300] J.—To invalidate a contract on the ground of *fraud, it must be shown that the party sought to be charged upon it was induced by the fraud to enter into the contract. Here, it is found by the jury that Hearn made the proposal, induced by other motives

than the concealment of Way as to his own debt.] The fraud preceded the signing of the guarantee. Way knew that Hearn was acting in reliance upon the honesty of the statement of Read's affairs, for the preparation of which Way was in part responsible. The case of Hill *v.* Gray, 1 Stark. N. P. C. 434 (E. C. L. R. vol. 2), goes further than it is necessary to carry the present case. There, the agent of the vendor of a picture knowing that the purchaser laboured under a delusion with respect to the picture which materially influenced his judgment, permitted him to make the purchase without removing the delusion; and it was held that the sale was therefore void. The defendant erroneously supposed, and the agent of the vendor knew it, that the picture he was buying was the property of Sir Felix Agar: and Lord Ellenborough said: "Although it was the finest picture Claude ever painted, it must not be sold under a deception. The agent saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it. I am of opinion that the contract is void." So, in Vine *v.* Mitchell, 1 M. & Rob. 337, it was held, that, where a creditor compounds with his debtor under a false impression, in which the debtor knowingly leaves him, as to the extent of the debtor's estate, the creditor is not estopped from suing for the balance of his debt. And in Jones *v.* Keene, 2 M. & Rob. 348, a policy of insurance on the life of A. had been assigned to the plaintiff: the defendant, having privately ascertained that A. was dangerously ill, treated with the plaintiff for the purchase of the policy for a small sum, representing it as the then value of the policy, the plaintiff not *being aware of A.'s [*301 illness; and it was held that this sale was void, and that the plaintiff might recover the value of the policy, in an action of trover. Rolfe, B., in the course of his summing up, said: "If the defendant had privately ascertained the illness of Laing, and then treated with the plaintiffs *without communicating the fact to them*, and they supposing that he was still in good health, there could be no doubt such conduct was grossly dishonourable. But he had no difficulty in going further than this, and telling them, that, if they believed the facts as stated on the part of the plaintiffs, the defendant's conduct amounted to legal fraud, and he could not set up any title to the policy so acquired." Railton *v.* Mathews, 10 Clark & F. 934, is also most material. It was there laid down by the House of Lords that the mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety-bond, is such undue concealment as to vitiate the transaction, though not wilful or intentional, or with a view to any advantage to the party himself. Here, the plaintiff was well aware of the desperate state of Read's affairs, and that they had been incorrectly represented to the defendant; and yet he allowed the latter to enter into an engagement which he knew he would not have entered into if he had been made acquainted with the true state of things. This clearly was such a fraud as, according to these authorities, discharged the defendant from all responsibility.

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is brought for the breach of a contract to indemnify the plaintiff against half the loss or liability he might incur in respect of

a bill for 110*l.* drawn upon him by one Read. It appeared that Way,
*302] *Hearn, and Read were all upon amicable terms; that Read had an execution in his house; that Hearn, the attorney and friend of Read, being desirous that the sheriff should be paid out, asked Way to accept the bill for 110*l.* for the purpose of raising the money; and that Way consented to do so upon Hearn giving his undertaking to bear half the loss that might be incurred thereby. In the result, Way has sustained a loss arising out of the transaction, of 95*l.*, and he now seeks to recover from Hearn a moiety of that sum. I think he is entitled to succeed. The main question which has been argued before us has been whether that apparent liability of Hearn upon his undertaking has been got rid of by an alleged fraud practised by Way upon Hearn. The circumstances relied upon are these:—Read's affairs being in an embarrassed state, at the suggestion of Way and Hearn an accountant was brought from London for the purpose of preparing a statement to lay before the creditors; and, in making out that statement, Way asked Read to conceal the fact that he was indebted to him (Way) in the sum of 2000*l.*,—Way's motive for this concealment being that he was unwilling that it should come to the knowledge of his wife that he had lent so large a sum to his friend without having any security for it. I mention the alleged motive for the concealment of this large debt, because upon the fact of the concealment much of the argument has been based. This, however, occurred before the execution came in against Read, and consequently at a time when the raising of the 110*l.* in the manner above described could not have been in the contemplation of the parties. But, undoubtedly, when that arrangement did take place, Hearn was deceived as to the condition of Read's affairs; and it is manifest that the supposition that Read was in a better state by 2000*l.*
*303] than he really was in had considerable *influence on the mind of Hearn when he entered into the undertaking declared upon. But the question is, was there any fraud on the part of Way? The jury found that the suggestion to raise the 110*l.* to pay out the execution came from Hearn; and they also found that Way did not make any direct representation to Hearn that Read was not indebted to him. It seems to me that these findings of the jury are decisive of the question. Mr. *Karslake* has very strongly urged, that Way, knowing the impression produced on the mind of Hearn by the balance-sheet, the mere suppression of the fact that Read was so largely indebted to him was evidence of fraud. But I think the finding of the jury removes Mr. *Karslake* from that ground. Way had a motive,—such as it was,—for keeping that fact secret. Besides, he hoped that his friend Read would work through his difficulties. He incurs this liability at the request of Hearn, and upon the promise of the latter to indemnify him against one-half of the loss that might arise therefrom. There was no active fraud, as it seems to me, and no intention on the part of Way to overreach Hearn; and under the circumstances I do not think that Hearn's promise is rendered void.

Then, it is perfectly clear that the bill which the plaintiff accepted was a bill drawn by Read and accepted by the plaintiff for the purpose of raising money to pay out the sheriff; and that the money was raised on the 24th or the 25th of October. The letter is dated the 24th;

and in it the defendant writes,—"You (the plaintiff) having lent your name to Mr. Read on a bill for 110*l.*, *payable three months from this date*, the proceeds to be applied to the discharge of the amount payable to the sheriff, I undertake to share with you any loss or liability you may incur in respect of *such bill*." It appears upon the evidence that the *bill accepted by the plaintiff was drawn and dated on the 25th of October; and it is contended that the defend- [*304 ant's promise is confined to indemnifying the plaintiff in respect of a bill dated the 24th, and cannot charge him in respect of a bill of a different date. But I think the substance of the transaction was a promise on the part of the defendant to stand half the loss that might arise by reason of the plaintiff's having lent his name to Read on a bill for 110*l.*, and that the bill is sufficiently identified. Although there is falsa demonstratio in one respect, the rest of the surrounding circumstances are abundantly sufficient in my judgment to identify the subject-matter of the contract; and effect must be given to the substance of the transaction.

The third ground of objection urged on the part of Mr. Hearn, is, that, instead of enforcing payment of the bill by Read at the end of the three months, Way and Read obtained time by frequent renewals of the bill originally given, thereby, as the defendant contends, materially changing his position. But the defendant's promise was, to indemnify the plaintiff against the loss which might be occasioned by the plaintiff's acceptance of the bill referred to in that letter. When that bill was dishonoured, a loss was occasioned to the plaintiff provided he paid the amount, and he would then have been entitled to call upon the defendant to reimburse him a moiety. What has been done since does not in my judgment in any way alter the plaintiff's rights. The object was to diminish the risk of loss, by giving Read a chance of paying the renewed bills. I think the defendant cannot urge this as any ground of defence against his undertaking to indemnify the plaintiff.

WILLIAMS, J.—I am of the same opinion. To make out *a defence on the ground of fraud, the defendant must show that [*305 the plaintiff was guilty of a fraud by means of which he was induced to enter into the contract. I cannot find any evidence of fraud here. Assuming the deceitful balance-sheet to constitute a fraud, it was not a fraud committed with a view to this transaction. Upon the finding of the jury, it is plain that the contract was entered into at the instance of the defendant, and was not induced by any fraud or misrepresentation or concealment on the part of the plaintiff. However wrong it was on the plaintiff's part to allow the defendant to remain under an impression that the statement prepared by the accountant contained a true representation of Read's affairs, that was not such a fraud as will, within the principles of the decided cases, invalidate the contract. As to the second point, Haigh *v.* Brooks, 10 Ad. & E. 309, 323 (E. C. L. R. vol. 37), 2 P. & D. 477, 4 P. & D. 288, and that class of cases to which Mr. *Karslake* has referred, has been very much misunderstood. In order to warrant the admission of evidence to explain a written instrument, the ambiguity must be latent. All that was meant to be decided by those cases, I apprehend, is, that, where there is a latent ambiguity, the intention of the parties to the contract may be explained

by evidence of the surrounding circumstances. There is nothing new in that doctrine. But here there are no surrounding circumstances which could give this instrument any other meaning than that which is the ordinary meaning of the words to be found in it,—viz., that it refers to an existing bill drawn by Read upon Way. It is not pretended that there was more than one bill, namely, that drawn on the 25th of November, 1859. As to the remaining point, it is clear that as soon as the bill was dishonoured,—or rather not met by Read,—the liability against the half of which the defendant undertook to indemnify the plaintiff was incurred: and I think the plaintiff is not
*306] the less entitled to be *indemnified according to the contract because by obtaining time he endeavoured to diminish the loss. Upon the whole, I think the plaintiff is entitled to recover against the defendant the moiety of the loss he has actually sustained.

WILLES, J.—I am of the same opinion. The jury have negatived active fraud and misrepresentation. And what is called concealment is the abstaining from informing the defendant as to a circumstance in respect of which if information had been desired by the defendant, he should have asked for it. As to the date of the bill, I think we are entitled to suppose that a bill dated the 25th of October was lying on the table at the time the indemnity was signed, and that by mistake it was misdescribed as being of the same date as the memorandum. There could be no doubt as to the identity of the thing which the parties were contracting about. The only question is whether there was any evidence that the bill was in existence at the time. The language of the memorandum,—"*You having* lent your name," &c.—would refer either to a past time or to the present. There was no suggestion that there was any other bill than that which was dated the 25th. I therefore think that fairly and in accordance with the truth and justice of the case, this objection may be got over. As to the last objection,—There is no doubt that a liability was incurred on the 28th of January, 1860. That liability has never yet been got rid of: and I see no evidence of any laches or default on the part of the plaintiff which could in any way discharge the defendant from the performance of the obligation he has entered into.

BYLES, J.—I am of the same opinion. I abstain from giving any opinion as to the finding of the jury, the rule having been moved
*307] solely upon the points *reserved. The fraud which was sought to be established at the trial was, a positive statement by Way to Hearn that no debt existed as between Read and himself; and the circumstances were relied on as showing what was said to amount to fraud in law. The question of fraud in fact was left to the jury, and disposed of by them; and the other, so far as it was matter of law, was reserved to the Court. Without saying anything as to Way's conduct in suffering a statement of Read's affairs to appear without disclosing the large debt due to himself, I will assume that it amounted to a fraudulent concealment,—still, as my brother Williams has observed, this being a contract of indemnity, and not of suretyship, and having, as the jury have found, been procured at the instance of Hearn, and not of Way, and not having been procured by means of that fraud, however reprehensible Way's conduct may have been, that affords no answer to this claim. Further, this not being a case of

principal and surety, but Way having lent his name at the instance of Hearn to procure this money for Read, as long as Hearn keeps it in the pocket of Read it is not competent to him to adopt one part of the contract and repudiate the rest. As to the date of the bill, it seems to me that the fair and obvious meaning of the defendant's letter is, "You having already put your name to a bill," &c. Now, the bill of the 25th of October was the only bill which was shown to exist, and to none other could the letter refer; and therefore I think this objection is disposed of by the maxim "Præsentia corporis tollit errorem nominis." As to the renewal of the bill,—if this had been a contract of suretyship that would have been material; but, as it is a case of indemnity, the situation of the party is in no degree varied by what has been done. Rule discharged.

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*RIPPEN *v.* PRIEST and Others. *Nov.* 15. [*308

The testator devised to his wife and his friends Lloyd and Brown (whom he also appointed executrix and executors) "all that his copyhold estate, &c., and all moneys in the funds, and *securities for money, debts on mortgage*, and all other his estate and effects," &c., subject to the payment of all his just debts and funeral and testamentary expenses," in trust for the wife for life, &c. Part of the property consisted of a mortgage in fee:—Held, that the devisees took the fee in the mortgaged land, notwithstanding there were in other parts of the will directions as to what the other two trustees were to do with the "mortgage-debt" after the decease of the wife.

The legal interest in land mortgaged in fee will pass under the words "mortgages or securities for money."

THIS was an action of ejectment brought for the recovery of certain freehold land at Hanwell Green, in the county of Middlesex, which was tried before Keating, J., at the sittings in Middlesex after the last term.

James Trayloe, of Hanwell, by his will, dated the 16th of October, 1837 (which was before the Wills Act, 11 G. 4 & 1 Vict. c. 26, came into operation), devised as follows:—

"I give and bequeath unto my dear wife, Priscilla Trayloe, the free use and enjoyment of all and singular my household goods and chattels, plate, linen, china, and other effects which shall be in and about my dwelling-house at the time of my decease, for and during the term of her natural life; and, from and immediately after her decease, I desire that the same and every part thereof be sold in such way and manner as my executors hereinafter named shall deem most advantageous, and the produce thereof shall sink into and become a part of my residuary estate: I give and bequeath unto my niece, Grace Harding, the rents, issues, and profits of the leasehold estates in the parish of St. George the Martyr, Southwark, and St. Mary, Lambeth, in the county of Surrey, lately demised by me to Samuel Cox, for and during the term of her natural life; and I direct that the rent or rents reserved by such demise, after paying the several ground-rents of the respective leasehold estate be apportioned in equal weekly sums, and that the same be paid weekly by the said Samuel Cox into the proper hands of my *said niece Grace Harding, and her receipt alone, notwithstanding her present or any future coverture, shall be a good and [*309 sufficient discharge and discharges for such weekly payments; and,

from and immediately after her decease, I give and bequeath the said rents, issues, and profits unto her sons William Harding and John Harding and the survivor of them, his executors and administrators, for all the residue of the several terms of years therein then to come and unexpired, in equal shares, during their joint lives, and the whole of such weekly rents (upon the decease of one of them) to the survivor, his executors and administrators, to be paid and payable in such and the like manner as I have hereinbefore directed to be made to their mother (such bequests to the said Grace Harding and her sons to be subject nevertheless to the proviso or condition hereinafter contained, that is to say, that, if she or they, or either of them, shall sell, alien, or dispose of or otherwise part with or encumber her or their or his estate and interest in the said leasehold estates, or any part thereof, or become bankrupt, or take the benefit of any Act for the relief of insolvent debtors, then I declare that from thenceforth the share and interest of the party therein so offending shall go to and become vested in my nephew William Trayloe, his executors and administrators, for his and their own use and benefit; and I expressly direct that the said Samuel Cox shall not on any account or pretence whatsoever pay the said weekly sums in advance either to the said Grace Harding or to her said two sons, but only as and when the same shall become due and payable,—the first of such weekly payments to be made to the said Grace Harding within one month after my decease: and it is my will and desire that the said Samuel Cox, his executors, administrators, and *assigns, shall receive and take the rents and profits of all that my leasehold house situate at the corner of Hooper street and Gloucester street, Lambeth, now in the occupation of S. Bartram, to and for his and their own use during so long a time as he or they shall continue to pay the said weekly rent to my said niece, and, after her decease, to her said two sons and the survivor of them, his executors and administrators, in manner aforesaid: and I hereby declare, that, if the said Samuel Cox shall make default in payment of the said weekly sums after the same shall have become due and payable for the space of twenty-one days, or if he shall pay the said sums in advance before the same shall have actually become due, or shall pay the same to any other person than the said Grace Harding, William Harding, and John Harding, or the survivor, then and in either of the said cases the said bequest to the said Samuel Cox shall be null and void, and from thenceforth the rents and profits of such last-mentioned leasehold house shall be received by my nephew the said William Trayloe, his executors and administrators, and retained by him and them for his and their own use: I give, devise, and bequeath unto my said dear wife Priscilla and my friends James Lloyd, of, &c., and Charles Brown, of, &c., all that my copyhold estate situate at Hanwell aforesaid, and all moneys in the funds, and securities for money *debts on mortgage*, and all other my estate and effects of whatever nature or kind soever, or wheresoever situate (not hereinbefore bequeathed), subject to the payment of all my just debts and funeral and testamentary expenses, upon trust to receive the rents, issues, and profits of my said copyhold estate, and all the interest, dividends, and annual proceeds of the residue of my estate, and thereout in the first place to

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pay the annual *premiums which may from time to time become necessary for keeping up a policy of assurance for the [*311 sum of 999*l.* effected by me many years since upon the life of my said wife, in the County Life Assurance Society in London, and the residue of such rents, interests, dividends, and annual proceeds, in trust for my said wife, for her own sole use and benefit, during the term of her natural life; and, from and immediately after her decease, I give, devise, and bequeath unto my said nephew, William Trayloe, all my said copyhold messuages, lands, and hereditaments, with their respective appurtenances, situate at Hanwell aforesaid, for and during the term of his natural life; and, from and after his decease, I give, devise, and bequeath the same to his son, James Trayloe, his heirs and assigns for ever, but upon this condition, nevertheless, that no road or footpath shall be made or used thereupon or any part thereof, to communicate with the land adjoining heretofore sold by me to Dr. Hume; and it is my will and desire that the several tenants now residing upon my said copyhold estate shall not be molested, turned out of possession, or their present rents raised, provided they pay their rents (except in case of carrying on any noisy or offensive trade or business), and that the said tenants do have the same rights and privileges continued to them during their respective occupations as they now have or may enjoy at the time of my decease: I give and bequeath unto the said James Lloyd and Charles Brown the proceeds of the said policy of assurance for 999*l.* which will become payable on the death of my said wife, with all accumulations thereon: also that reversionary interest of and in the share of Sophia Huselage in and to a certain part or share of 2000*l.* Consols which will also become payable upon the death of my said wife; and also *all that mortgage-debt or sum of* 680*l. due to me from Edward* *Charmers, [*312 *and secured, with interest thereon at the rate of* 5*l. per cent., on his freehold estate at Hanwell*, upon trust to collect and get in the several moneys to become due and payable upon and by virtue of the said policy of assurance and reversionary interest, and to invest the same in 3 per cent. Consols or Reduced Bank Annuities, and to pay the dividends arising therefrom *and also the interest on the said mortgage-debt* of 680*l.* into the proper hands of my wife's nephew James Rippen and Martha his wife jointly during their joint lives, for their joint use and benefit; and their joint receipt shall be a sufficient discharge to my executors for the same; and, after the decease of him or her, then to pay the whole of such dividends and interest to the survivor of them during his or her life for his or her sole use and benefit; and, from and after the decease of the survivor of them, then upon trust to pay, transfer, and divide such principal stock, moneys, and *mortgage-debt*, to and amongst all and every such children or child of them the said James Rippen and Martha his wife as the survivor of them shall or may by any deed or instrument, or by his or her last will and testament, or by any codicil or codicils thereto, appoint to receive or give and bequeath the same; and, in default thereof, then in trust for all and every the children of the said James Rippen and Martha his wife, in equal shares and proportions, with benefit of survivorship: I give and bequeath unto the said James Lloyd and Charles Brown all that other mortgage-debt or sum of 700*l.* due to me from William

Fox, and secured, with interest thereon at the rate of 5 per cent., on his copyhold estate at Hanwell, upon trust to pay a moiety of the interest arising thereon, from and after the death of my said wife, into the proper hands of my said nephew William Trayloe, for his life; and, from and after his decease, to stand
*313] *possessed of a moiety of the said principal sum of 700*l.* and interest in trust for all and every the children of the said William Trayloe (except James, whom I have hereinafter provided for), in equal shares and proportions, with benefit of survivorship, the shares to be paid and payable on their, his, or her respectively attaining the age of twenty-one years; and, as to the other moiety of the said interest arising from the said mortgage-debt or sum of 700*l.*, I direct my said trustees to pay the same into the proper hands of my said niece Grace Harding for her life, and, from and after her decease, to stand possessed of the remaining part of the said last-mentioned mortgage-debt and interest, in trust to pay and divide the same equally between her said two sons William Harding and John Harding and the survivor of them (in the event of either of them dying in the life-time of their said mother) upon their or his attaining the age of twenty-one years: I give and bequeath unto the said James Lloyd and Charles Brown all that other mortgage-debt or sum of 1036*l.* due to me from John Bransgrove, and secured, with interest thereon at the rate of 5*l.* per cent., on his copyhold estate at Hanwell, upon trust to pay the interest thereof into the proper hands of my niece Elizabeth Davis for her life, and her receipt alone, notwithstanding any present or any future coverture, shall be a good and sufficient discharge and discharges to my said trustees from time to time for the same; and, from and after her decease, to stand possessed of the said last-mentioned mortgage-debt of 1036*l.* and interest, upon trust for all and every the lawful children of the said Elizabeth Davis which may be living at her decease, in equal shares and proportions, and if there shall be only one such child, then the whole to such one child upon attaining the age of twenty-one years: But, in case the said Elizabeth
*314] Davis shall happen to die *without leaving lawful issue her surviving, then I give and bequeath the said mortgage-debt or principal sum of 1036*l.* in manner following, that is to say, the sum of 600*l.*, part thereof, unto and amongst all the lawful children of my said nephew William Trayloe (except his son James, whom I have hereinbefore provided for), as shall be living at the decease of the said Elizabeth Davis, in equal shares and proportions, to be paid and payable on their respectively attaining the age of twenty-one years, with benefit of survivorship; and the sum of 436*l.* (the residue thereof) unto the said William Harding and John Harding equally between them, and, in case either of them shall then be dead, then the whole to the survivor, his executors and administrators: And it is my will and desire that none of the mortgages by me hereinbefore given shall be called in or proceedings against the respective mortgagors taken to compel payment of the same respectively, unless there shall be six months' interest in arrear and unpaid; and, further, that the principal sums so secured on mortgage as aforesaid, when the same shall be received, shall be invested by my said executrix and executors in the purchase of 3 per cent. Consols or reduced Bank Annuities, upon

the like trusts and to and for the same intents and purposes as are hereinbefore declared of and concerning the same respectively: I give and bequeath unto John Moore, of, &c., the legacy of 200*l.* stock New 3½ per cent. Annuities: I also give and bequeath unto my friend Martha Judge, daughter of Elizabeth Judge, the legacy of 100*l.* like stock: And I hereby declare that the bequests to the said Grace Harding, Elizabeth Davis, and Martha Judge shall not be subject to the control, debts, or engagements of any present or after-taken husband; and their receipts alone, notwithstanding any coverture, shall be good and sufficient discharges *to my executors for the same: And as to the rest, residue, and remainder of my estate [*315 and effects, of what nature or kind soever, and wheresoever situate, after the demise of my said wife, I direct my said executors hereinafter named to sell and dispose thereof and convert the same into money, and pay and divide the same, after the payment of all necessary expenses thereout, to, between, and among the said Grace Harding, William Trayloe, and James Rippen, in equal shares and proportions, with benefit of survivorship: And I hereby nominate, constitute, and appoint my said dear wife and the said James Lloyd and Charles Brown executrix and executors of this my will, hereby revoking all wills or other testamentary dispositions by me at any time heretofore made, and declare this only to be my last will and testament: And, lastly, I give and bequeath unto each of them the said James Lloyd and Charles Brown the legacy of 10*l.* upon their proving this my will: And I desire that they do retain from time to time all their just and reasonable expenses in carrying the trusts of this my will into execution, out of the said trust estates. In witness," &c.

The question was whether Priscilla Trayloe, under whose will the plaintiff claimed, took under the will of James Trayloe an estate for life only, or an estate in fee, she having survived the other two executors.

Under the direction of the learned Judge, a verdict was taken for the plaintiff, leave being reserved to the defendants to move to enter a verdict for them or a nonsuit, if the Court should be of opinion that Priscilla Trayloe took only an estate for life.

Honyman, on a former day in this term, obtained a rule nisi accordingly.

H. Mills, Q. C., and *R. E. Turner* showed cause.—*Upon the [*316 true construction of the will of the testator, James Trayloe, the fee simple in the whole property passed by the general words of the devise to his wife and Lloyd and Brown. The words are as large as can be,—"I give, devise, and bequeath unto my dear wife Priscilla and my friends James Lloyd and Charles Brown, all that my copyhold estate situate at Hanwell, and all moneys in the funds and *securities for money, debts on mortgage*, and all other my estate and effects of whatever nature or kind soever, or wheresoever situate (not hereinbefore bequeathed), subject to the payment of all my just debts and funeral and testamentary expenses." If the will had stopped there, there could have been no doubt. But what follows amounts to no more than declarations of trust. That these general words will carry mortgages in fee and trust estates is clear. [BYLES, J.—Primâ facie.] It lies upon those who seek to cut down the generality of the words,

to show that a contrary intention appears from subsequent parts of the will. Mr. Jarman, discussing the operation of a general devise on real estate vested in the testator as mortgagee or trustee, says,—Jarman on Wills, 2d edit. 591 (3d edit. 658),—"The rule at length established, after much fluctuation of authority, is, that such property *will* pass under a general devise of lands, unless a contrary intention can be collected from the testator's expressions, or from the purposes or limitations to which he has devoted the subject of disposition." At p. 597 (3d edit. 664), he says: "Whether lands held by a testator as mortgagee will pass by the words 'mortgages' or 'securities for money,' has been the subject of much controversy. The affirmative was supposed to have been decided in the early case of Crips *v.* Grysil, Cro. Car. 37: but, on a recent examination of the record (see 9 B. & C. 282 (E. C. L. R. vol. 17)), it appeared that the will contained in addition to the
*317] *word 'mortgages,' other expressions more unequivocally applying to the land. The first of the modern cases in which this question was agitated, was Renvoise *v.* Cooper, 6 Madd. 371, where a testator devised all the residue of his freehold hereditaments, of what nature or kind soever, unto his wife H., her heirs and assigns, to sell and dispose of as she pleased, and he gave all the residue of his bonds, *mortgages*, and other securities for money and effects, unto his said wife; Sir John Leach, V. C., held that a mortgage in fee passed. He observed: 'It may be that the mortgaged fee will not pass to the wife by the residuary devise of the freehold estate, because, having no mortgage for years, the subsequent gift of mortgages to the wife marks this testator's intention that it should not pass by that devise. But, if this be so, *I am of opinion that the mortgaged fee will pass to the wife by the subsequent gift of mortgages and other securities for money*, though coupled with personal property. In substance, money secured by a mortgage in fee is personal property, and a gift of a mortgage-security for money is a gift of all the testator's money and security; and will therefore pass the fee.'" In Ex parte Barber, 5 Simons 451, Vice-Chancellor Shadwell held that the words "securities for money" would pass the legal estate. The like was held in Knight *v.* Robinson, 2 Kay & J. 503. In re King's Estate, 21 Law, J., Ch. 672, 5 De Gex & S. 644, a testator, a mortgagee in fee of real estate, gave and bequeathed to A. all his moneys, securities for money, and all his goods, chattels, personal estate, and effects whatsoever and wheresoever, to hold to A., his executors, administrators, and assigns, he paying thereout all his debts: and it was held that the legal estate in the mortgaged property passed to A. "I think," said Vice-Chancellor Parker, "that I should be throwing the law on this subject back-
*318] wards, and *departing from what seems a very convenient rule of construction,—a rule which obviously effects the testator's intention,—if I held that the legal estate did not pass." The general rule may, therefore, now be considered as firmly established, that the legal estate in a mortgage in fee passes by the words "mortgages or securities for money." Reliance will be placed on the other side upon the subsequent devise to Lloyd and Brown; but, to give any operation to that, it is necessary to interpolate the words "from and after the decease of my said wife." Further, the devise is to persons who are afterwards appointed executors and executrix, and upon

whom is imposed the duty of paying the testator's debts and funeral and testamentary expenses, which necessarily gives them the fee: Creaton *v.* Creaton, 3 Smale & G. 386; Smith *v.* Smith. 11 C. B. N. S. 121 (E. C. L. R. vol. 103); Spence *v.* Spence, 12 C. B. N. S. 199 (E. C. L. R. vol. 104). In Spence *v.* Spence, the testator, by a will made subsequently to the 7 W. 4 & 1 Vict. c. 26, after directing that his debts and funeral and testamentary expenses should be paid by his executors as soon as conveniently might be after his decease, devised all his real and personal estate to trustees (whom he afterwards appointed his executors), in trust to pay the rents and proceeds thereof to his son J. S. for his natural life; and, from and after the death of J. S., in trust for the right heirs of him the said J. S. for ever; and it was held, that, by reason of the direction to them to pay the debts, &c., the trustees took the legal estate in fee. Byles, J., in giving judgment, there says: "Mr, Jarman, in his treatise on Wills, 3d edit. Ch. 34, upon a review of all the authorities, comes to this conclusion, that, although the mere fact that the devised property is charged with debts or legacies will not vest the legal estate in the trustees, unless they are directed to pay them, or the *will contains some other indications of an intention to create a trust for the purpose: [*319 yet, where the land is devised to the trustees, and they are appointed executors, and are directed to pay the debts, which the testator has charged upon the land, the legal estate vests in the trustees, and the beneficiaries are only cestuis que trust. The case of Creaton *v.* Creaton, 3 Smale & G. 386, is distinctly in point. There, the testator, after directing payment of his debts in the first place, devised all his copyhold estates to three trustees (also his executors) and the survivor of them, and the heirs of the survivor, upon trust to pay the rents to his daughters and the survivor of them, for life, in equal moieties, and, after the decease of the survivor, he devised the estate (in moieties) to the heirs of the body of each of his daughters, with remainder over to the right heirs of his surviving daughter: and it was held that the interests limited in the remainder were equitable estates. There, as here, there was first an active trust in favour of the tenant for life, and then a mere passive trust: but the debts were to be paid: and the Vice-Chancellor (Stuart) held, in conformity with the rule laid down in Jarman, that the last estate was a mere equitable estate." The same argument was urged in Creaton *v.* Creaton which will be urged here: but no weight was given to it.

Honyman, in support of the rule.—It is not denied that the fee in mortgaged property will pass under the words "mortgages" or "securities for money." Here, the only question is, what estate passes by the will of James Trayloe to the trustees and executors. In the notes to Jeffreson *v.* Morton, 2 Wms. Saund. 11 *c* and 11 *e*, where this subject is very elaborately discussed, the learned editors say,—11 *c*, n. (*o*),—"It should be observed, that, if land be devised to trustees, and debts *or annuities are charged on it by the will, that alone [*320 does not give the legal estate to the trustees; but, if they are directed to pay the debts or annuities, then they have the legal estate for that purpose: Kenrick *v.* Beauclerk, 3 B. & P. 175; Doe d. Cadogan *v.* Ewart, 7 Ad. & E. 636, 668 (E. C. L. R. vol. 34), 3 N. & P. 197; even though there be no direct devise to them of the land: Doe d.

Beezley *v.* Woodhouse, 4 T. R. 89; Anthony *v.* Rees, 2 Cr. & J. 75."† Again, p. 11 *e*, n. (*r*),—"With respect to the *quantity* of the estate which shall vest in trustees: By the old law, where a man devised land to trustees or executors, *without any words of limitation*, for payment of his debts, or until his debts are paid, or till a particular sum shall be raised out of the rents or profits, they will take only a chattel interest, *i. e.* an interest for so many years as are necessary to raise the sum required: Cordal's Case, Cor. Eliz. 316; Corbet's Case, 4 Co. Rep. 81 b; Manning's Case, 8 Co. Rep. 96 a; Co. Litt. 42 a; Hitchens *v.* Hitchens, 2 Vern. 404. And, even where there is a devise to trustees *with words of inheritance*, they shall take only so much of the legal estate as the purposes of the trust require: Doe d. White *v.* Simpson, 5 East 162; Doe d. Player *v.* Nicholls, 1 B. & C. 336, 342, 344 (E. C. L. R. vol. 8); Nash *v.* Coates, 3 B. & Ad. 839 (E. C. L. R. vol. 23); Doe d. Gord *v.* Needs, 2 M. & W. 129;† Barker *v.* Greenwood, 4 M. & W. 421;† Ackland *v.* Lutley, 9 Ad. & E. 879 (E. C. L. R. vol. 36); 1 P. & D. 636; Ackland *v.* Pring, 2 M. & G. 937 (E. C. L. R. vol. 40); 3 Scott N. R. 297. See also Heardsworth *v.* Williamson, 1 Keen 33; Doe d. Woodcock *v.* Barthrop, 5 Taunt. 382; Glover *v.* Monckton, 3 Bingh. 13 (E. C. L. R. vol. 11); 10 J. B. Moore 453 (E. C. L. R. vol. 17); Doe d. Budden *v.* Harris, 2 D. & R. 36 (E. C. L. R. vol. 16). But it is otherwise where there is a devise to the trustees, with functions which show the intention of the testator that they should take the fee." The Court must, therefore, look at the whole will, and so construe it as, if possible, to make the whole consistent. The intention, *321] it is *submitted, is clear, to give the wife a life interest. The bequest is of the whole to the wife, Lloyd, and Brown, for some period. If it is for the life of the wife, one can readily understand what follows. The will is evidently the production of a person not skilled in will making. [BYLES, J.—The great difficulty is, that the words "securities for money" have been held to give the whole interest, whether the word "heirs" be used or not. It must be so: otherwise they could not give a discharge of the land.] Lloyd and Brown, taking the remainder in fee, might give a discharge. [BYLES, J.—The subsequent clause is a direction only to Lloyd and Brown, not a devise.] If the whole legal interest is in the wife, then there is a direction to two to sell and dispose of that which is vested in the heir at law of one. In Creaton *v.* Creaton, the devise was to the trustees and their heirs, and there was an express trust to pay debts. In Spence *v.* Spence, the will was made after the statute 7 W. 4 & 1 Vict. c. 26, and there was a direction to the trustees (who were also executors) to pay debts, which is a very different thing from a devise to them, subject to the payment of debts.

ERLE, C. J.—I am of opinion that this rule should be discharged. The question is what estate Priscilla Trayloe took under the will of her husband James Trayloe. In form, the will gives the security for money or mortgage-debt with which we are dealing to the testator's wife and his two friends James Lloyd and Charles Brown (who are afterwards appointed executrix and executors), subject to the payment of all his just debts and funeral and testamentary expenses. The question is, what estate the trustees took. If an absolute interest, then the plaintiff, who claims under a devise from the wife, who survived

the other two trustees, is entitled to recover. I am of opinion that *the will must be so construed as to vest the fee simple in the security in the three trustees. Before the late Statute of Wills, [*322 in general words of inheritance were necessary to pass a fee. Thus, a devise of Blackacre to A. B., without more, gave an estate for life only: but a devise of "all my *estate* called Blackacre" passed a fee. So, the words "securities for money" have acquired a known technical meaning, and will pass the whole interest of the testator in the mortgaged premises. The form of the will in question is, to give the beneficial interest in the property to the wife for her life, and, after her death, to certain relations of the testator. He evidently contemplated that the other two executors and trustees, Lloyd and Brown, would have imposed upon them the duty of applying the interest and profits to the legatees after his wife's death. It turns out, however, that the wife has survived them. I think the will is perfectly well carried into effect by holding that she as survivor took the fee. That makes the whole entirely consistent. And the words are sufficient to admit of that construction. The wife, Lloyd, and Brown are appointed executors and trustees, and they are charged with the payment of the debts and funeral and testamentary expenses. I therefore think the plaintiff, who claims under the wife, is entitled to recover.

BYLES, J.—I entirely agree in the construction my Lord has put upon this will. It may be that the matter is made more clear by the introduction of the words "and all other my estate," &c.: but the opinion I form rests upon the words "securities for money." It has been held in a great many cases, that, in the case of a mortgage, these words will pass the legal estate in the mortgage,—in fee, if the mortgage is in fee. If that were not so, the trustees and executors would be *unable to call in the mortgage-money. It is unnecessary [*323 to argue the matter upon principle; for, Sir John Leach, M. R., held in Renvoise *v.* Cooper, 6 Madd. 371, that "a gift of a mortgage security for money is a gift of all the testator's interest in the money and security, and will therefore pass the fee." And Parker, V. C., in the case of In re King's Estate, 21 Law J., Ch. 672, 5 De Gex & S. 644, adopts that, and says: "I think that I should be throwing the law on this subject backwards, and departing from what seems a very convenient rule of construction,—a rule which obviously effects the testator's intention,—if I held that the legal estate did not pass:" and he further says that the occurrence of the word "heirs" makes no difference. That being so, it seems to me that as well on authority as on principle the devise here is a devise of the whole interest of the testator in the mortgaged property; and that construction, so far from being cut down, seems to me to be strengthened by the subsequent words. It might peradventure be necessary to call in the mortgage to pay the debts in the lifetime of all the trustees. It was necessary, therefore, that they should have the fee. All that the testator is afterwards dealing with, is, with reference to the beneficial interest, and not to the legal estate. He speaks of this as a mortgage-debt. The second residuary clause also shows that the testator supposes he has nothing more to dispose of. Upon the whole, I am of opinion that this is a devise of the legal interest in the mortgage in question to the trustees, and to nobody else.

KEATING, J.—I am of the same opinion. This will is certainly so framed as legitimately to give rise to many of the arguments urged by Mr. *Honyman*. The real key to the construction seems to me to be this, that the testator has done what testators very commonly do, *viz., assume that nature will take a certain course, and direct the disposal of the property with that notion. This testator evidently contemplated that his two trustees Lloyd and Brown would survive his wife. He gives the security in question absolutely to the three; and he gives it by words which undoubtedly convey the fee to them. Then, assuming that the death of his wife will take place before that of Lloyd and Brown, he proceeds to deal with the beneficial interest in that event; and, assuming that the whole legal interest is in the three trustees or the survivor of them, changing the phrase, he directs what shall be done with the interest of the "mortgage-debt." It appears to me that this is the only sensible reading of which this will is susceptible, and it makes the whole consistent and natural. I therefore think the plaintiff is entitled to retain his verdict.

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Rule discharged.

HUGHES and Another *v.* GRIFFITHS. *June* 10.

In the computation of time, where the last day falls on a Sunday or holiday, and the act is to be done by *the Court*, and not by the party, ex. gr. the sealing of a writ,—it may be done on the next practicable day.

A warrant under the Absconding Debtors Act, 1857, 14 & 15 Vict. c. 52, was issued by a County Court Judge, upon an affidavit that the defendant was about to go abroad. The seven days limited for the issuing of a capias expired on Good Friday:—Held, that a capias issued on the following Wednesday was in time,—that being the earliest day on which it was practicable to issue the writ.

THE Absconding Debtors Act, 14 & 15 Vict. c. 52, recites that, "whereas the laws now in force for the arrest of debtors absconding from England are insufficient and inadequate for that purpose, by reason of the delay which is occasioned in obtaining the necessary process: and whereas frauds are perpetrated upon creditors residing at a distance from London by debtors embarking for distant countries from various towns *and seaports in England: and whereas it is expedient to provide a more expeditious and efficacious mode of obtaining process for the arrest of debtors about to quit England, in all cases where such debtors are now liable by law to be arrested."

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The 1st section then enacts, that, "from and after the passing of this Act it shall be lawful for any commissioner of the Court of Bankruptcy acting for any district in the country, or the Judge of any district County Court, except the County Court Judges acting in the counties of Middlesex and Surrey, on application by or on behalf of any creditor, upon due proof upon affidavit, intituled in one of Her Majesty's superior Courts of common law, of the creditor applying, or of some other person, or by solemn affirmation in cases in which solemn affirmation is allowed by law, to the satisfaction of such commissioner or Judge, that a debt of 20*l.* or upwards is owing to such

creditor, and is then payable from the person or persons against whom such application shall be made, and that there is probable cause for believing that such debtor or debtors, unless he or they be forthwith apprehended, is or are about to quit England with intent to avoid or delay the said creditor, or with intent to remain out of the jurisdiction of the Courts of law in England so long that thereby the said creditor will or may be delayed in the recovery of the said debt, to grant a warrant,—in the form in the schedule,—to the messenger of the said Court of Bankruptcy, or to the high bailiff of the said County Court, whereby the said messenger or high bailiff shall have authority at any time within seven days after the date of the said warrant, including the day of such date, to arrest the person or persons named in such warrant, and him or them safely keep until he or they shall have given bail to such messenger or high bailiff, or made deposit with *him, according to the practice observed in the superior Courts of law, or until he shall have paid the debt and costs endorsed [*326 on the said warrant, or be otherwise discharged from arrest under such warrant by due course of law, and that such warrant shall bear date the day of the issuing thereof, and may be executed in any part of England, and that a copy of such warrant or warrants shall at the time of the arrest be served upon the party arrested: Provided always, that every creditor who shall cause such warrant to issue *shall forthwith cause to be issued a writ of capias*, and also, in cases where no action shall be pending, shall, before the issuing of such writ of capias, cause a writ of summons to be issued out of some one of the superior Courts of law against such debtor or debtors, and that upon such capias all mandates and warrants shall issue according to the practice now in use, notwithstanding that the defendant shall have been arrested by virtue of any warrant or warrants granted by such commissioner or Judge, and such debtor or debtors shall, if in custody, be served with such writ of capias *within seven days from the date of such warrant, including the day of such date;* and thereupon such debtor or debtors shall be considered and deemed to have been arrested by virtue of the said writ of capias, and all proceedings shall be had upon such writ of capias as if the same had been issued prior to the issuing of such warrant, and the arrest made on such writ of capias, and according to the practice now observed in the said superior Courts of law."

The 5th section enacts that "it shall be lawful for any person arrested upon any such warrant forthwith before the issuing of the said writ of capias to pay the debt and costs which shall be endorsed on such warrant to the said messenger or high bailiff as aforesaid, or to enter into a bail-bond to such messenger *or high bailiff, [*327 with two sufficient sureties, for the amount which shall be endorsed on such warrant, conditioned to put in special bail as required by the said warrant, or to make deposit of the sum endorsed on such warrant, together with 10*l.* for costs, and thereupon he shall be entitled to be discharged from custody, and such messenger or high bailiff is hereby authorized to discharge such person accordingly.

And the 6th section enacts, that, "as soon as the person so arrested as aforesaid has been taken into custody or detained under the writ

of capias hereinbefore mentioned, the force and effect of the said warrant so granted as aforesaid shall immediately cease and determine, and the said sheriff shall hold the said person under or by virtue of the said writ of capias, in like manner as if the said person had been first arrested under and by virtue of the same, or, in case the person so arrested shall have made deposit with the said messenger or high bailiff as aforesaid, or entered into such bail-bond as aforesaid, then, upon delivery to the messenger or high bailiff respectively by whom such person was arrested of a copy of the warrant granted by the sheriff upon such writ of capias as aforesaid, the said messenger or high bailiff shall pay over to such sheriff as aforesaid the said deposit, or assign to the said sheriff such bail-bond as aforesaid, and the said sheriff shall then hold the said deposit or bail-bond in his own name, or to assign the same in the same manner as if the said person had been first arrested on the said writ of capias, and the said deposit had been made or bail-bond entered into with the said sheriff: Provided always that the said sheriff shall not be in any manner liable or answerable for any default, misbehaviour, or miscarriage of the person to whom such warrant was addressed, or of the person or persons
*328] making the *arrest under and by virtue of the said warrant: Provided also, that, if no writ of capias be issued and served within seven days from the date of the said warrant, including the day of such date, the person arrested under such warrant shall be entitled to be discharged from custody, or in case the deposit has been made with or bail-bond given to the said messenger or high bailiff, then the said deposit shall be returned, and the said bail-bond given up to be cancelled."

On the 12th of April, 1862, the plaintiffs obtained from the Judge of the County Court of Staffordshire holden at Walsall, a warrant to arrest the defendant under the provisions of the Absconding Debtors Act, 1851 (14 & 15 Vict. c. 52), founded upon an affidavit in which the plaintiffs swore that the defendant was indebted to them in a certain sum, and that the said debt was owing and then payable to them from the defendant. The affidavit also contained the following allegations,—"The said Samuel Griffiths (the defendant) a few days since said to me, 'Friend Hughes: I shall be compelled to bolt, they are pressing me so hard: I shall go to Italy, out of the way:' and one of the clerks of the said Samuel Griffiths has since informed me that all the said Samuel Griffiths's things were packed up in London, ready for him to start to the continent; and which statements of the said Samuel Griffiths and of his said clerk I verily believe to be true."

On the 14th of April, the defendant was arrested under this warrant, but was discharged on giving bail. On the 23d the plaintiffs obtained an order for a writ of capias, which was issued and served on the same day. The defendant afterwards took out a summons to rescind that order; and on the 6th of May the following order was
*329] made by Williams, J.,—"I do order that my order *made in this cause on the 23d of April instant (*sic*) be rescinded, and the writ of capias issued in pursuance thereof, and all subsequent proceedings, be set aside, on the ground that the capias was not issued within seven days of the warrant: and I order that the defendant be discharged out of the custody of the sheriff of Staffordshire as to his action.

Matthews, in Easter Term last, obtained a rule nisi to set aside Mr. Justice Williams's order. He submitted, that, as the seventh day from the issuing of the warrant was dies non, viz. Good Friday, when, the offices being closed, no writ of capias could issue until Wednesday the 23d, the capias issued on that day was in time. He referred to Eld *v.* Vero, 8 Exch. 655,† and Rowberry *v.* Morgan, 9 Exch. 730.†

M. Smith, Q. C., and *Quain* showed cause.—The arrest and detainer of the defendant under the capias cannot be sustained, unless the Easter holidays are to be excluded from computation. The statute does not except them: its language is imperative, and, as it is a matter affecting the liberty of the subject, it must be construed strictly. In Rowberry *v.* Morgan, 9 Exch. 730,† where Sunday was the last day for appearing to a specially endorsed writ under the 15 & 16 Vict. c. 76, s. 27, a judgment signed on the following Monday, for want of an appearance, was held to be regular. Referring to that case, it is said in Archbold's Practice, 10th edit. 144, that "it is not quite clear how time is to be reckoned under the Common Law Procedure Acts (1852, 1854). It seems, that, where those Acts refer to something at the time of their passing known to the practice of the Courts, the 174th rule of the Hilary Term, 1853, applies. But that, where an entirely new course of proceeding or practice is introduced by those Acts, *the rule does not apply."(*a*) In Chambers *v.* Smith, 12 M. & W. 2,† it was held that the fifteen days which by [*330 the Uniformity of Process Act, 2 W. 4, c. 39, s. 3, must elapse between the teste and return of a writ of distringas, are fifteen *clear* days; and that the days between the Thursday before and the Wednesday after Easter Day are to be reckoned in the computation of such fifteen days. The 6th section of this Act shows that the capias must be issued within seven days. And s. 3 enacts that "the warrant or warrants which shall be issued by virtue of this Act shall be auxiliary only to the processes now in use, and shall be wholly void and of none effect whatsoever as a protection to the person on whose behalf such warrant shall have issued, *unless such writ of capias shall be issued and served in manner aforesaid.*" Then, the question arises whether the capias can stand by itself. To allow this, would be allowing the party to be twice arrested for the same cause, which would be manifestly a violation of the statute. In Masters *v.* Johnson, 21 Law J., Exch. 253, it was held that the capias issued under this Act ceases to have any operation if not served within seven days; and that it cannot be treated as a valid capias under the 1 & 2 Vict. c. 110. [WILLIAMS, J.—I do not see why, if the defendant is going abroad, the capias should be set aside because the proceedings under the Absconding Debtors Act are wrong.] The one proceeding being *merely auxiliary to the other, if the one falls, it is obvious [*331 that both must fall.

Lush, Q. C., and *Matthews*, in support of the rule.—It is submitted, that, under the circumstances, the capias issued in time; and that, at

(*a*) See Morris *v.* Barrett, 7 C. B. N. S. 139 (E. C. L. R. vol. 97). By a Judge's order the debt and costs were to be paid by instalments of 2*l.* on the 25th of each month: the 25th happening to be a Sunday, the instalment was offered on Monday, and refused, and judgment was signed on the following day: and the Court set aside the judgment, holding that the defendant had the whole of Monday to pay the money.

all events, it may be supported as a capias under the 1 & 2 Vict. c. 110. The seventh day from the date of the warrant under the 14 & 15 Vict. c. 52 being Good Friday, no writ could be issued until the following Wednesday. Every Act of Parliament having reference to writs must be read with the knowledge that there are certain days on which writs cannot be issued. By the 3 & 4 W. 4, c. 42, s. 43, Easter Monday and Tuesday are made holidays: and by the rule of Hilary Term, 6 W. 4, Good Friday and Easter Eve are added. Those four days, therefore, are close holidays, and no writ could be issued upon either of them; and, if the last day falls on one of them, it must necessarily be excluded from the computation. [*Smith.*—That is repealed by the rules of Hilary Term, 1853 (13 C. B. 1 (E. C. L. R. vol. 76)). The rules now in force are the 174th and 175th of that term. The former provides, that, "in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving; in which case the time shall be reckoned exclusively of that day also." And the latter provides, that "the days between Thursday next before and the Wednesday next after Easter Day, and Christmas Day and the three following days, shall not be reckoned or included in any *rules, notices*, or other proceedings except notices of trial, or notices of inquiry."] It is *not a question of excluding a day from the computation here. [ERLE, C. J., referred to the case of Rawlings, app., The Overseers of West Derby, resp., 2 C. B. 72, 1 Lutw. Reg. Cas. 373, where Sunday was held not to be excluded from the time limited for the service of a notice of claim on the overseers, under the 6 & 7 Vict. c. 18, s. 4.] That was the case of an act done *by the party:* here, the act to be done,—the sealing of the writ,—is one that is to be done by the officer of the Court. Where the last day falls on a Sunday or holiday, and the act is one which is to be done by the Court, and not by the party, that day is necessarily excluded. and it may be done on the next possible day. In Rowberry *v.* Morgan, 9 Exch. 730,† the question was whether the plaintiff had violated the restraint imposed on him by the statute. In Lewis *v.* Calor, 1 Fost. & Fin. 306, it was ruled by Erle, C. J., that Sunday is not included in the days for appearance to a writ under the Bills of Exchange Act, 18 & 19 Vict. c. 67, if it be the last day. [*Smith* referred to Peacock, app., The Queen, resp., 4 C. B. N. S. 264 (E. C. L. R. vol. 93), where it was held that Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior Courts, under the 20 & 21 Vict. c. 43, s. 2, although it be the last day.] That was an act to be done *by the party*, which is very different from an act of the Court, which cannot be done on a Sunday or holiday. In Archbold's Practice, 10th edit. 787, it is said: "If the last of the days for putting in bail fall on a Sunday, the defendant has all the Monday following to put in bail; and so, if the last of the days be Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, the defendant has all the following day to put

them in. Where the arrest was on the 1st of April, and the 8th and 9th were Easter Monday and *Tuesday, the Court held that the defendant had the whole of Wednesday to put in bail, and [*333 set aside a writ in an action on the bail-bond, sued out on the 10th, although not served until the 11th :" Alston *v.* Underhill, 1 C. & M. 492.† So, in Wheeler *v.* Green, 7 Dowl. P. C. 194, where the declaration was filed on the 24th of December, with notice to plead in four days, judgment signed for want of a plea on the 29th was set aside for irregularity. Then, as to the service,—no seven days are limited where the party is not in custody. "Forthwith" means without unseasonable delay.

ERLE, C. J.—I am of opinion that Mr. *Lush* is entitled to have the order of my brother Williams set aside upon one short ground. By the statute, the creditor is authorized to obtain a warrant for the arrest of his debtor when there is reason to believe he is about to abscond; and he is required forthwith to cause a writ of capias to be issued, and to cause the debtor, if in custody, to be served with such writ of capias *within seven days from the date of such warrant*, including the day of such date; and then the action is to proceed in the ordinary way. Now, the capias cannot be issued unless the Court is in a position to act. I am of opinion, that, when the last of the seven days happens to fall on a day which is declared to be a holiday, and on which the Court cannot act, the party has until the next following day on which the Court can act to issue his writ. It seems to me that the distinction between a thing which is to be done by the Court and a mere act of the party, is maintainable. Where the act is to be done by the Court, and the Court refuses to act on that day, the intendment of the law is that the party shall have until the earliest day on which the Court will act. Here, the seventh day *fell [*334 on Good Friday, when no writ could issue. I think it was well issued on the Wednesday, which was the earliest day on which it could issue. I am aware of no case with which this can conflict. Under the Bills of Exchange Act, 18 & 19 Vict. c. 67, the defendant has twelve days within which to enter an appearance: and in Lewis *v.* Calor, 1 Fost. & Fin. 306, I ruled that, the twelfth day being a Sunday, the party had all the thirteenth to appear. I find the legislature in that Act contemplated these very rules; because in s. 7 they enact that "the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said Acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under that Act." The cases Mr. *Lush* referred to as to the time for putting in bail are strictly analogous. Thus, in Alston *v.* Underhill, 1 C. & M. 492,† where the time for putting in bail expired on Easter Monday, the Court of Exchequer held, that, as it could not be done before, the party had the whole of the following Wednesday for putting in bail. The same principle is exemplified in Wheeler *v.* Green, 7 Dowl. P. C. 194. There is, therefore, as it seems to me, abundant analogy for the decision we have come to in this case; and I am not aware of any authority against it. Rowberry *v.* Morgan, 9 Exch. 730,† if properly understood, will be found to be entirely inapplicable. The defendant had eight days to appear: it

would be imposing additional delay and vexation on the creditor, if, where the eighth day happened to be Sunday, the time for appearing should be extended to the ninth day. As no act was to be done by the Court there, the Sunday counted. There is nothing in that that is inconsistent with the decision I am now pronouncing. Without, *335] therefore, going *into the distinction between serving or issuing the capias, it seems to me that the writ having issued on the first day on which it could be issued, it was in time, and the plaintiff is entitled to succeed on this motion.

WILLIAMS, J.—I am of the same opinion. The difficulty which I have felt arises from the consideration that we are not deciding here with reference to any rule or practice of the Court, but what is meant by the Act of Parliament,—the proceeding being entirely the creature of the 14 & 15 Vict. c. 52. I am very sensible of the hardship which a strict and literal construction superinduces in this as in many other cases. I had very many similar applications at Chambers by reason of the intervening holidays, causing in some instances very serious consequences. But, upon the whole, I agree with my Lord that we should put a liberal interpretation upon this statute, and to hold that the legislature meant that where the last day was one on which it was not practicable to issue the capias, the party should have another day.

WILLES, J.—I am of the same opinion. I must confess I have felt the same difficulty as my brother Williams as to the construction of this Act of Parliament. I cannot help thinking that the language of its several parts is a little inconsistent. But, seeing that it is an Act framed for the purpose of aiding creditors, and adding to the power of the County Courts with a view to prevent debtors from absconding, I think it is not too much to say that the Act should be construed with reference to the practice which it recognises. I therefore think it not unreasonable to hold that the legislature intended *336] that the statute should be construed by the light of that practice. If that be so, the *case of Lewis *v.* Calor, 1 Fost. & Fin. 306, where my Lord held that the time allowed by my brother Keating's Act for the defendant's appearance might be extended to the thirteenth day where the twelfth was a Sunday, is in point with reference to this Act. The rules of practice are by express enactment made applicable to the proceedings under that Act. And, though there are not so many words to the same effect here, yet there is abundant evidence that it was intended that the proceedings under this Act should be conducted in accordance with and analogy to the proceedings of the Courts in other cases. If the last day on which an act is to be done by the Court is a Sunday or holiday, the act is to be done at the earliest time that is consistent with the convenience of the Court. I am led to this conclusion by considering the absurdity which would follow if the warrant were dated on Wednesday in Passion Week, in which case the last of the seven days would be the Tuesday following, and consequently the only day on which the application could be made for the capias would be the Thursday,—thus giving the party only *one* day instead of seven. That would be a practical absurdity.(*a*) The last of the seven days must be a day

(*a*) Suppose the warrant dated on the Thursday before Easter Day, the seven days would expire on the Wednesday next after. That would equally give the plaintiff only one day in addition to the day of the date of the warrant.

on which it is possible for the plaintiff to obtain the capias. Whatever may have been the doubts which have crossed my mind during the discussion, I am now satisfied that the decision the Court has arrived at is the correct one.

BYLES, J.—I am of the same opinion; and I found my opinion entirely upon the words of the Act of *Parliament. The meaning I take to be this,—the creditor shall have seven days [*337 in which to set the Court in motion. Consequently, the seventh day must be one upon which the Court can be set in motion; otherwise, the party would not have that which the legislature contemplated that he should have. Without, therefore, further enlarging upon the matter, or referring to any of the numerous analogous cases which on diligent search might be found, I content myself with saying that I entirely agree with the conclusion my Lord and my two learned brothers have arrived at. Rule absolute.

ORMSON *v.* CLARKE.[a] *Nov.* 19.

Tubular boilers for horticultural buildings had formerly been cast in several pieces,—a ring for the top and bottom with holes or sockets therein into which vertical tubes cast separately were fixed by means of iron cement. The plaintiff took out a patent for "an improvement in the manufacture of cast tubular boilers," which consisted in casting the whole in *one piece*, and which the jury found to be useful and beneficial to the public:—Held, not the subject of a patent.

THIS was an action for an alleged infringement of a patent for an improvement in the manufacture of cast tubular boilers for the heating of horticultural buildings. The *form* of the boiler was not new; that having been long known as Weeks's boiler, which consisted of two hollow rings with holes and sockets for the reception of vertical tubes, which were all cast separately, the tubes being afterwards fixed with iron cement to the rings, so as to form the boiler. The improvement of which the plaintiff claimed to be the inventor, was, casting the whole boiler in one piece; there was no claim in the specification as to the *mode* of casting, the inventor being unwilling to make that known.

The declaration was in the usual form; and all the *usual [*338 pleas were pleaded. The alleged infringement consisted in the casting of a boiler like Weeks's boiler, but in *two* pieces only, the tubes and one ring being cast together, the other ring separately.

At the trial before Erle, C. J., at the sittings at Westminster after last Trinity Term, in answer to a question put to them by his Lordship, the jury found that the plaintiff's invention was useful and beneficial to the public, and a verdict was found for the plaintiff on all the issues.

Montague Smith, Q. C., on a former day in this Term, pursuant to leave reserved, obtained a rule nisi to enter a verdict for the defendant, on the grounds,—first, that there was no invention which was new and the subject of a patent, and no invention to sustain the patent,—secondly, that, if there was any invention, the specification was insufficient, and did not describe it, and did not disclose any

invention the subject of a patent,—thirdly, that there was no infringement.

Shee, Serjt., and *Aston*, on a subsequent day, showed cause, and *M. Smith*, Q. C., *Webster*, and *Thrupp*, were heard in support of the rule. The argument was confined to the first point mentioned in the rule; and the following authorities were referred to:—Boulton *v.* Bull, 2 H. Bl. 463; Brunton *v.* Hawkes, 4 B. & Ald. 541 (E. C. L. R. vol. 6); Cornish *v.* Keen, 3 N. C. 570 (E. C. L. R. vol. 32); 4 Scott 337; Kay *v.* Marshall, 5 N. C. 492 (E. C. L. R. vol. 35); 7 Scott 548; Walton *v.* Potter, 1 Webster's P. C. 592; 4 Scott N. R. 91, 3 M. & G. 411 (E. C. L. R. vol. 42); Minter *v.* Mower, 1 Webster's P. C. 140; Russell *v.* Cowley, 1 C. M. & R. 864;† Losh *v.* Hague, 1 Webster's P. C. 203; Hindmarch on Patents, 95, 96; Crane *v.* Price, 4 M. & G. 580 (E. C. L. R. vol. 43); 5 Scott N. R. 338; Steiner *v.* Heald, 6 Exch. 607;† Templeton *v.* M'Farlane, 1 House of Lords Cases, *595; Smith *v.* The London and North Western Railway Company, 2 Ellis & B. 69; Harwood *v.* The Great Northern Railway Company, 29 Law J., Q. B. 193, in error, 31 Law J., Q. B. 198; Brook *v.* Aston, 8 Ellis & B. 478; Seed *v.* Higgins, 8 House of Lords Cases 550; Ralston *v.* Smith, 9 C. B. N. S. 117; 11 C. B. N. S. 471 (in error); and Horton *v.* Mabon, 12 C. B. N. S. 437 (E. C. L. R. vol. 104).(a)

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Erle, C. J.—I am of opinion that this rule should be made absolute, on the ground that the invention claimed by the plaintiff in his specification is not one which can be the subject-matter of a patent. Tubular boilers such as those in question are perfectly well known and have long been used for the heating of horticultural buildings. The product therefore is not new; the only novelty is, the casting in one piece that which used formerly to be cast in several pieces. I am of opinion that that is not the subject for which a patent can be taken out. The new mode probably requires more skill in the workmen than the old one: but there is no claim for any novelty in the process of casting. I therefore think, that, consistently with the rule laid down by the Court of Queen's Bench in Harwood *v.* The Great Northern Railway Company, 29 Law J., Q. B. 193, in error 31 Law J., Q. B. 198, and adopted and acted upon in this Court in Horton *v.* Mabon, 12 C. B. N. S. 437 (E. C. L. R. vol. 104), we cannot hold that the invention specified here is one for which a patent could legally be granted.

Williams, J.—I also am of opinion that this rule must be made absolute. We were much pressed in the course of the argument with a case of Smith *v.* The London and North Western Railway Company, 2 Ellis & B. 69 (E. C. L. R. vol. 75). But I think that case has no application *whatever to the present. The discussion there turned entirely upon the question whether or not the plaintiff's patent had been infringed by the defendants: the Court treated the patent, as my brother Martin did at Nisi Prius, as one for the invention of a wheel as described by the plaintiff in his specification, a material part of which invention was a new and peculiar mode of welding the nave. My brother Martin ruled at the trial that an imitation of this mode of welding was an infringement of the plaintiff's patent, and therefore the subject of an action: and the Court of

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(a) And see Mackelcan *v.* Rennie, antè, p. 52.

Queen's Bench did no more than sustain that ruling. In the present case, however, there is no claim for a new process; all the plaintiff claims as his invention is, the casting in one piece that which had before been usually cast in several pieces. That clearly is no subject for a patent.

BYLES, J.—I am of the same opinion. If the claim here had been for a new mode of casting these tubular boilers, and the specification had properly described and claimed it, peradventure our decision might have been otherwise. But a mere improvement in performing an operation already well known and long practised cannot be the subject of a patent. If we were to hold this to be a good subject for a patent, we should be extending the protection granted by letters-patent to a most inconvenient degree.

KEATING, J.—I am entirely of the same opinion.

Rule absolute.

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*CHANNON *v.* PARKHOUSE. *Nov.* 24. [*341

The mere circumstance of the plaintiff being an officer in the navy, and hoping to be shortly appointed to a ship, which would disable him from attending to give evidence at the trial if the venue were changed,—Held, sufficient to induce the Court to retain the venue where laid; although it was sworn that all the defendant's witnesses resided at the place to which it was sought to change it.

DENMAN, Q. C., on a former day in this term, obtained (on behalf of the defendant) a rule to show cause why the venue in this case should not be changed from London to the county of Devon, upon an affidavit stating that the action was brought to recover the value of a quantity of furniture purchased by the defendant in the way of his business of an auctioneer, appraiser, and furniture-broker, and paid for by him; that the plaintiff's cause of action, if any, arose in the county of Devon, and not in the city of London or elsewhere out of the county of Devon; that the defendant intended to call as witnesses on his behalf at the trial of the cause several persons who were all resident in Plymouth, where the plaintiff's and defendant's attorneys both resided; and that, under the circumstances, the deponent believed that the cause could be tried at much less expense at Exeter than in London.

Collier, Q. C., showed cause, upon an affidavit of the plaintiff, who described himself as an engineer in Her Majesty's navy, in which he stated, that, in August, 1861, he was appointed engineer on board of Her Majesty's ship Pantaloon, and on the 15th of September, 1861, he left England in the said ship, and proceeded to the East coast of Africa, where the ship ran aground in Poncha Bay, and the plaintiff was, with other officers of the said ship, ordered home, and arrived in England on the 27th of September, 1862; that, on his return to England, the plaintiff discovered that his wife had been living in adultery with one C., *a major in Her Majesty's —— regiment [*342
of foot, and the plaintiff had instituted proceedings in Her Majesty's Court for Divorce and Matrimonial Causes, which proceedings were then pending, praying for a dissolution of the marriage;

that the plaintiff also found, on his return to England as aforesaid, that, in July last, his said wife, whilst so living in adultery as aforesaid, made an application to the defendant for the sale of the plaintiff's household furniture and effects in one lot, and that the defendant, without making any inquiries, purchased the whole or the greater part thereof at a price much below its value, and removed it to his sale-room; that his (the plaintiff's) said wife had no authority from him to sell the said household furniture and effects, and the sale thereof to the defendant was made without his (the plaintiff's) knowledge or consent; that the action was brought to recover the said household furniture and effects, or damages for the wrongful conversion thereof; that, being an engineer in Her Majesty's navy, the plaintiff might at a very short notice be appointed to a ship about to proceed to foreign parts, and he verily believed that he should receive such an appointment before the next Assizes are held for the county of Devon; that the plaintiff was advised and verily believed that he was the most material and necessary witness in the action, and that he could not safely proceed to the trial thereof without his evidence; and that, in the event of the venue being changed, the plaintiff verily believed he should be prevented from attending the trial at Exeter, or be compelled to apply to this Court to have the trial put off until he should again return to England. [ERLE, C. J.—The cause of action arose at Plymouth, and all the witnesses, except the plaintiff, reside there. Convenience would therefore seem to point at Devonshire as the proper place of trial.] The plaintiff's affidavit *345] *shows that he will in all probability be unable to attend at the trial if the venue should be changed. The rule, laid down in Archbold's Practice, 10th edit. 1294, is, that the venue may now be changed in a transitory action, at the instance of the defendant, to the county where the cause of action arose, "unless the plaintiff shows that the cause may be more conveniently tried in the county in which the venue was originally laid, or other good reason why it should not be changed." It is submitted that the affidavit in answer to the motion sufficiently shows that the cause may be more conveniently tried in London.

Denman, Q. C., in support of his rule.—The application is manifestly a reasonable one; and nothing is suggested in the affidavit in answer to counterbalance the inconvenience and the enormous expense which will attend the bringing all the defendant's witnesses from Plymouth to London. The main question will be as to the value of the goods, which could only be proved by witnesses on the spot; whereas, all the evidence which could be required from the plaintiff would be a denial of the wife's authority to sell the goods, which might very well be given on interrogatories or under a commission.

ERLE, C. J.—I think the plaintiff is entitled to keep the venue in London: but, at the same time, I think he should consent, that, in the event of his succeeding on the trial, his costs shall be taxed as though the trial had taken place at Exeter.

The rest of the Court concurring, and the plaintiff's counsel consenting, Rule discharged accordingly.

*READER *v.* KINGHAM. *Nov.* 24. [*344

The plaintiff, the bailiff of a County Court, being about to arrest one H. under a warrant of contempt for non-payment of a judgment-debt, the defendant, in consideration that he would forbear to execute the warrant, promised to pay the plaintiff 17*l.* on a given day or surrender H.:—Held, that this was not an agreement by the defendant to be answerable for the debt or default of H., but an original promise by the defendant to pay the money or surrender H., for which a note in writing was not required by the Statute of Frauds.

ON the 6th of May last, the plaintiff, who was bailiff of the Buckinghamshire County Court, was about to arrest one Hitchcock under a warrant of commitment for disobedience of an order made in a cause in the County Court of Malins *v.* Hitchcock, when the defendant (who was Hitchcock's brother-in-law) promised the plaintiff that, if he would forbear to execute the warrant, he the defendant would before 12 o'clock on the following Saturday morning pay the plaintiff 17*l.*, which sum the plaintiff said he was authorized by Malins to take in satisfaction of the debt and costs in the County Court, or surrender Hitchcock. The plaintiff accordingly forbore to arrest Hitchcock; but the defendant neither paid the money nor surrendered Hitchcock. The 17*l.* was not the whole debt and costs in the suit in the County Court. These amounted to between 34*l.* and 35*l.* But the plaintiff in that suit had authorized the bailiff to take 17*l.* in satisfaction. Under these circumstances, the present action was brought by the bailiff against Kingham upon his undertaking.

At the trial before the undersheriff of Buckinghamshire on the 2d of July last, it was objected on the part of the defendant, upon the supposed authority of Butcher *v.* Stewart, 12 Law J., Exch. 291, 9 M. & W. 405,† 1 Dowl. N. S. 620, Goodman *v.* Chase, 1 B. & Ald. 297, and Davies *v.* Fletcher, 2 Ellis & B. 271 (E. C. L. R. vol. 75), 22 Law J., Q. B. 429, that the defendant's promise being a promise to answer for the debt of another, it was one which by the 4th section of the Statute of Frauds, 29 Car. 2, c. 3, required to be in writing.

The undersheriff ruled that this was a conditional *promise [*345
to pay and therefore within the 4th section of the Statute of Frauds, and ought to have been in writing; and that, on the evidence of the plaintiff, he had not released Hitchcock from the debt. He accordingly directed the jury to find for the defendant, reserving leave to the plaintiff to move to enter a verdict for him for 17*l.*, if the Court should be of opinion that his ruling was erroneous.

Evans, on a former day in this term, obtained a rule nisi.—He submitted that the promise sued upon was an original promise to pay the plaintiff 17*l.* upon the consideration named, and not a collateral promise to answer for the debt or default of a third person within the 4th section of the Statute of Frauds.

Lush, Q. C,, and *Hannen*, on a subsequent day, showed cause.—The promise in question was a promise to answer for the debt or default of another, and therefore within the 4th section of the Statute of Frauds: the debt of Hitchcock was not extinguished; he remained and still remains liable upon the original judgment: Davies *v.* Fletcher, 2 Ellis & B. 271 (E. C. L. R. vol. 75). Part of the contract here was, that, Kingham failing to pay the money, Hitchcock was to be surrendered.

The true test whether the Statute of Frauds applies or not, is, whether or not the principal remains liable for the debt: if he does, the promise is collateral, and must be in writing; if not, it is an original promise, and need not be in writing. This is the rule laid down in the notes to Forth *v.* Stanton, 1 Wms. Saund. 211, and also in the notes to Birkmyr *v.* Darnell (1 Salk. 27), in 1 Smith's Leading Cases, 5th edit. 262, 263. In the former it is said: "The question is, what is the promise? Is it a promise to answer for the debt, default, or
*346] miscarriage of another, *for which that other *remains liable?* Not, what the *consideration* for that promise is; for, it is plain that the nature of the consideration cannot affect the terms of the promise itself, unless, as in the case of Goodman *v.* Chase, 1 B. & Ald. 297, it be an extinguishment of the liability of the original party." Mr. Smith observes,—"In that case, the defendant, in consideration that the plaintiff would discharge A. B., whom he had taken under a capias ad satisfaciendum, promised to pay A. B.'s debt. It was held unnecessary that the promise should be in writing, for the defendant's liability on his promise could not begin till the plaintiff had discharged A. B. out of custody, since that discharge was made a condition precedent; but the moment A. B. was discharged, *his* liability was at an end, so that the defendant was never liable for a debt of A. B., the debt had ceased to be due from A. B. before the defendant became liable to pay it. The same point occurred in Butcher *v.* Stewart, 11 M. & W. 857."† [BYLES, J.—There, the promise was made to the plaintiff, here, it is to a third person.] The statute does not in terms say to whom the promise shall be made. The words are, "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." A promise, to come within that enactment, must be collateral,—leaving the debt or duty still due: if it be to the debtor himself, it is not within the statute; that is a case of indemnity. [WILLIAMS, J.—In Hargreaves *v.* Parsons, 13 M. & W. 561,† the defendant and one Parker agreed for the sale by Parker to the defendant of the "put or call" of fifty foreign railway shares at
*347] *a certain price per share premium, at any time on or before the 18th of February, 1844. Before that day, the defendant agreed to re-sell the option to the plaintiff, and to guarantee the performance of the agreement by Parker. On the 16th of February, the plaintiff "called" the shares (*i. e.* required the delivery of them according to the agreement), but it was at the same time verbally agreed between him and the defendant and Parker, that they should be delivered by Parker to the plaintiff, not on the 18th of February, but on the 2d of March, at Paris; and it was held that this was not an agreement by the defendant to be answerable for the default of Parker, but an original promise by the defendant for the delivery of the shares by Parker, for which a note in writing was not required by the Statute of Frauds. In giving judgment, Parke, B., says: "The statute applies only to promises made to the person to whom another is already, or is to become, answerable. It must be a promise to be answerable for a

debt of, or a default in some duty by, that other person *towards the promisee.* This was decided, and no doubt rightly, by the Court of Queen's Bench, in Eastwood *v.* Kenyon, 11 Ad. & E. 438 (E. C. L. R. vol. 39), 3 P. & D. 276, and in Thomas *v.* Cook, 8 B. & C. 728 (E. C. L. R. vol. 15), 3 M. & R. 444. In this case Parker had not contracted with *the plaintiff*, nor was it intended that he should: there was no privity between them; the non-performance of Parker's contract with *the defendant* would be no default towards the plaintiff, and, consequently, the undertaking by the defendant was no promise to answer for the default or miscarriage of Parker in any debt or duty towards the plaintiff. It was an original promise that a certain thing should be done by a third person."] In Cripps *v.* Hartnoll, 31 Law J., Q. B. 150, the daughter of the defendant had been committed for trial on a charge of misdemeanor. *At the request of the defendant, the plaintiff became bail for her appearance, the defendant having [*348 previously promised to indemnify him against all liability in respect of so becoming bail, and from all costs, damages, and expenses in respect of the same. The defendant's daughter did not appear to take her trial, and the plaintiff was consequently put to certain expenses, as well as having his recognisance estreated: and it was held, upon the authority of Green *v.* Cresswell, 10 Ad. & E. 453 (E. C. L. R. vol. 37), 2 P. & D. 430, that the case was one within the 4th section of the Statute of Frauds, and therefore that the plaintiff could not recover in an action against the defendant, inasmuch as there was no agreement in writing, nor any note or memorandum thereof. In delivering the judgment of the Court, Crompton, J., there says: "The point which was raised before us, that, in order to bring the case within the Statute of Frauds, the debt or default in respect of which the promise is made must be towards the promisee, we say nothing upon; for, the very point was taken in Green *v.* Cresswell, and was held not to govern the case. We are bound by Green *v.* Cresswell; and, without expressing any opinion as to what would be the judgment of a Court of error upon the case before us, we hold that the nonsuit was right." Here the bailiff, to whom the promise was made, was the agent of the creditor to receive the money. He had a special authority to take 17*l.* in full, the debt and costs in the County Court amounting to between 34*l.* and 35*l.*: the promise, therefore, made to him was substantially a promise to Malins. [BYLES, J.—Could Malins have sued upon that promise?] It is submitted that he might. Eastwood *v.* Kenyon only decides that a promise *to the debtor* himself is not within the statute,—the Court saying that it applies only to promises made to the person *to whom* another is *answerable. WILLIAMS, J.—I must own I feel a great [*349 difficulty in getting this case out of Eastwood *v.* Kenyon and Hargreaves *v.* Parsons. The language of Parke, B., in the latter case is extremely strong.] The rule deducible from all the cases, it is submitted, is this,—if the promise extinguishes the debt, it is within the statute; if the performance of it only extinguishes the debt, it is not. [BYLES, J.—The plaintiff had no authority from Malins to let Hitchcock go, and afterwards retake him?] He authorized him to take 17*l.* in satisfaction: the bailiff took upon himself to give credit. That the language of the Courts in Eastwood *v.* Kenyon and Hargreaves *v.* Parsons cannot be literally adhered to, is clear from Cripps

v. Hartnoll. The promise there was not made to the original promisee. The real question is whether the original debt is extinguished. [KEATING, J.—The great authority is the note to Forth *v.* Stanton, 1 Wms. Saund. 211 *a*. It is there said, that, "where the promise is founded upon some *new* consideration sufficient in law to support it, and is not merely for the debt, &c., of another, such an undertaking, though in effect it be to answer for another person, is considered as an *original* promise, and not within the statute: as, where A. promises B. to pay him a sum of money in case he will withdraw his record in an action of assault and battery: Read *v.* Nash, 1 Wils. 305; Stephens *v.* Squire, 5 Mod. 205; Williams *v.* Leper, 3 Burr. 1886."] In Williams *v.* Leper, the original debt was extinguished. That is the ground upon which Lord Mansfield rests the decision. Here, however, the original debt remains. In Fitzgerald *v.* Dressler, 7 C. B. N. S. 374 (E. C. L. R. vol. 97), A., through the agency of B., a broker, sold a parcel of linseed to C., who through the same broker sold at an increased price to D. The time for D. to pay the price was to arrive before that fixed for the
*350] payment *by C. D. sent a clerk to the broker for the delivery order for the seed. The broker took him to A., from whom the clerk obtained the order upon the faith of his engagement that D. would pay A. for the seed. D. on the following day sent the broker a check for 900*l.* on account,—the precise quantity not having then been ascertained. Upon the seed being afterwards measured, it was found that the amount payable to A. upon his contract with C., was 971*l.* 15*s.* 6*d.* In an action by A. against D. to recover the difference between that sum and the 900*l.* check, it was held that the agreement by D.'s clerk was not a contract or promise to pay the debt of a third person, within the 4th section of the Statute of Frauds, the seed, the giving up the delivery order for which was the consideration for that promise, being the property of D., subject only to A.'s lien for the contract-price. Williams, J., there says: "The effect of the promise was neither more nor less than this, to get rid of the encumbrance, or, in other words, to buy off the plaintiffs' lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute. The case of Williams *v.* Leper, 3 Burr. 1886, proceeded upon this, that the defendant there had an interest in the property: his property was encumbered by the landlord's claim for rent; therefore, the promise was a promise to pay a debt to which that property was subject, and not simply a promise to answer for the debt or default of another, within the meaning of the statute. This is in accordance with the cases of Castling *v.* Aubert, 2 East 325, and Anstey *v.* Marden, 1 N. R. 124, which, as is stated in the note to which my Lord has referred,(*a*) were decided not to be
*351] within the statute, 'on the ground that there was in both *cases a purchase of an interest, not a mere undertaking to pay the debt of another.'"

Macnamara and *Evans*, in support of the rule.—It must be conceded that the imprisonment of Hitchcock under the warrant from the County Court, and consequently his discharge from custody, would not extinguish the debt: Ex parte Kinning, 4 C. B. 507, 522 (E. C.

(*a*) The note to Forth *v.* Stanton, 2 Wms. Saund. 211 *a*.

L. R. vol. 56). But here, it is submitted, the defendant's promise was not a promise to be answerable for the debt, default, or miscarriage of another; but was altogether a new and original liability undertaken by the defendant upon a sufficient consideration. Hitchcock being liable for a sum amounting to more than 34*l.*, and the plaintiff, as bailiff, being about to issue a warrant of contempt upon him, the defendant promises, that, in consideration that the plaintiff will forbear to do so, he will pay him 17*l.* on the following Saturday or restore Hitchcock to his custody. Was *that* a legal liability of Hitchcock? Clearly not. It was a totally different liability from that under which Hitchcock stood, and upon a totally different consideration. The case, therefore, is not within the Statute of Frauds, but falls precisely within the rule stated in the notes to Forth *v.* Stanton, 1 Wms. Saund. 211 *a*,—"Where the promise is founded upon some *new* consideration sufficient in law to support it, and is not merely for the debt, &c., of another, such an undertaking, though in effect it be to answer for another person, is considered as an *original* promise, and not within the statute." In Read *v.* Nash, 1 Wils. 305, a cause at the suit of the plaintiff's testator against one Johnson being at issue, the record entered, and just coming on to be tried, the defendant, in consideration that the testator would not proceed to trial, but would withdraw his record, *undertook and promised to pay him 50*l.* and the costs: and it was held that this was not within the [*352 Statute of Frauds. Lee, C. J., there says: "The true difference is between an *original* promise and a *collateral* promise; the first is out of the statute, the latter is not when it is to pay the debt of another which was already contracted." Speaking of that case, in Williams *v.* Leper, 3 Burr. 1890, Wilmot, J., says: "That was an *original* undertaking, the debtor was never liable for that particular sum of 50*l.*" And Lord Mansfield said: "The landlord had a legal pledge. He enters to distrain: he has the pledge in his custody. The defendant agrees that the goods shall be sold, and the plaintiff paid in the first place. The goods are the *fund:* the question is not between Taylor (the tenant) and the plaintiff. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors; and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the Statute of Frauds." Castling *v.* Aubert, 2 East 325, and Williams *v.* Leper, 3 Burr. 1886, are recognised in Thomas *v.* Williams, 10 B. & C. 661 (E. C. L. R. vol. 21), 5 M. & R. 625. In Anstey *v.* Marden, 1 N. R. 124, A. being insolvent, a verbal agreement was entered into between several of his creditors and B., whereby B. agreed to pay the creditors 10*s.* in the pound in satisfaction of their debts, which they agreed to accept, and to assign their debts to B.: and it was held that this agreement was not within the Statute of Frauds, not being a collateral promise to pay the debt of another, but an original contract to purchase the debts. This is the case of a promise to a stranger, and therefore falls precisely within the decision of the Court of Queen's Bench in Eastwood *v.* Kenyon, which was recognised and acted upon by the Court of Exchequer in Hargreaves *v.* Parsons and by this Court in Fitzgerald *v.* Dressler.

*ERLE, C. J.—I am of opinion that this action is maintainable, notwithstanding the objection that the Statute of Frauds [*353

required the defendant's agreement to be in writing and signed, and consequently that the rule to enter a verdict for the plaintiff should be made absolute. It appeared that one Malins had recovered a judgment in the County Court against Hitchcock for 34*l.* or thereabouts, debt and costs, and that a warrant had been obtained for the committal of Hitchcock to gaol for thirty days, and placed in the hands of the now plaintiff, who was bailiff of the County Court. Now, it is conceded that the arrest and imprisonment of the debtor under this warrant would not operate a discharge of the debt. Although the debt and costs exceeded 34*l.*, it seems the bailiff was instructed by Malins to accept 17*l.* in satisfaction. The bailiff being about to arrest Hitchcock at the house of his relative Kingham, the latter promised the bailiff that if he would abstain from executing the warrant, he would on the following Saturday either pay the 17*l.* or surrender Hitchcock. When the Saturday arrived, the defendant neither paid the money nor surrendered Hitchcock. The plaintiff (the bailiff) has therefore brought this action to recover the 17*l.*: and the question is whether the promise sued upon is a promise to answer for the debt or default of Hitchcock, within the 4th section of the Statute of Frauds. I am of opinion that it is not. The debt was due to Malins from Hitchcock: the promise was made to Reader. It has been distinctly settled, that, to bring the promise within the statute, the promisee must be the original creditor. Such was the decision of the Court of Queen's Bench in Eastwood *v.* Kenyon, 11 Ad. & E. 438 (E. C. L. R. vol. 39), 5 P. & D. 276. So also was the decision of the Court of Exchequer in Hargreaves *v.* Parsons, 13 M. & W. 561,† *354] where Parke, B., gave a considered judgment to *the same effect. And so was the decision of this Court in Fitzgerald *v.* Dressler, 7 C. B. N. S. 374 (E. C. L. R. vol. 97). There are two cases in the Court of Queen's Bench, where the plaintiff sued on a promise to indemnify him in consideration of his having at the defendant's request become bail for a third party, and where it was held that the statute required the promise to be in writing. Those were the cases of Green *v.* Cresswell, 10 Ad. & E. 453 (E. C. L. R. vol. 37), 2 P. & P. 438, and Cripps *v.* Hartnoll, 31 Law J., Q. B. 150. Whether the fact of the promise relating to bail makes any valid distinction, I do not stop to consider. But clear I am, that, upon the balance of authority, the promise of the defendant in this case is a collateral promise, and not within the statute. The debts are totally distinct debts, as well as the debtors. No satisfaction resulted to Malins on account of what passed between Kingham and Reader. Reader was the agent of Malins to accept 17*l.* in satisfaction of the debt and costs in the County Court; but he was not his agent to postpone the payment. If Malins had chosen, he might have revoked Reader's authority between the time of Hitchcock's release and the Saturday; and the payment of 17*l.* would have been no discharge of Malins's claim under the judgment. The payment of the 17*l.* therefore, would not necessarily have been a discharge of Malins's demand, but only a discharge or satisfaction of the contract between Kingham and Reader. The case is clearly not one to which the Statute of Frauds can apply.

WILLIAMS, J.—I am of the same opinion. I think the authorities

bind us to the principle that the 4th section of the Statute of Frauds applies only to the case of a promise made to one to whom another is answerable. It is said that the Court of Queen's Bench in Green *v.* Cresswell, 10 Ad. & E. 453 (E. C. L. R. vol. 37), 2 P. & D. *433, refused to acknowledge that principle, and that that case [*355 was recently acted upon by the same Court in Cripps *v.* Hartnoll, 31 Law J., Q. B. 150. My Brother Crompton, in giving judgment in the last-mentioned case, certainly says that the Court felt themselves bound by Green *v.* Cresswell; yet they did not decide it altogether with reference to such refusal. What the Court say is this: "The point which was raised before us, that, in order to bring the case within the Statute of Frauds, the debt or default in respect of which the promise is made must be towards the promisee, we say nothing upon; for, the very point was taken in Green *v.* Cresswell, and was held not to govern the case. We are bound by Green *v.* Cresswell: and, without expressing any opinion as to what would be the judgment of a Court of Error upon the case before us, we hold that the nonsuit was right." In Green *v.* Cresswell, Lord Denman, in delivering the judgment of the Court, says: "The promise in effect is, 'If you will become bail for Hadley, and Hadley by not paying or appearing forfeits his bail-bond, I will save you harmless from all the consequence of your becoming bail. If Hadley fails to do what is right towards you, I will do it instead of him.' If there had been no decisions on the subject, it would appear impossible to make a reasonable doubt that this is answering for the default of another." So that he actually put it on the fact of the duty being due from Hadley. And, after saying that "a distinction was also hinted at, from the circumstance of Hadley's debt being due to a third person, and the default therefore incurred towards him, and not towards the bail," he goes on,—"But here again is the surmise of an intention in the legislature which none of its language bears out; and, besides, may it not be said that the arrested debtor, who obtains his freedom by being bailed, *undertakes to his bail to keep them harmless, by [*356 paying the debt, or surrendering?" So that the Court distinctly put it on both grounds. The same Court distinctly decided in Eastwood *v.* Kenyon, 11 Ad. & E. 438 (E. C. L. R. vol. 39), 3 P. & D. 276, that the statute applies only to promises made to the person to whom the debt is due: and that decision is deliberately recognised by the Court of Exchequer in Hargreaves *v.* Parsons, 13 M. & W. 561.† Notwithstanding the Court of Queen's Bench in Cripps *v.* Hartnoll thought themselves bound by Green *v.* Cresswell, I do not feel that to be a denial of the authority of Eastwood *v.* Kenyon and Hargreaves *v.* Parsons. By these two cases I think we are bound: and they distinctly establish that the statute is not applicable to such cases as the present.

BYLES, J.—I am of the same opinion. The Court of Queen's Bench in Thomas *v* Cook, 8 B. & C. 728 (E. C. L. R. vol. 15), 3 M. & R. 444, held that the promise, to bring it within the statute, must be made to the original creditor; and that a promise to indemnify stands on the same ground. The Court of Exchequer in Hargreaves *v.* Parsons, 3. M. & W. 561,† in the written judgment of Parke, B., also lays it down that the debt in respect of which the promise is made

must be due to the promisee. And the last dictum, in this Court, of my Brother Williams, in Fitzgerald *v.* Dressler, 7 C. B. N. S. 374 (E. C. L. R. vol. 97), is to the same effect. The case is therefore concluded by the authorities. If it were not so, I should come to the same conclusion from reading the earlier part of the 4th section, which deals with promises that are to bind executors personally. The words are the plain and obvious words to use if it was intended to apply to the original promisee, but a very roundabout way of expressing it if meant to apply to a third person. This is not the
*357] case of an engagement *to the original promisee, nor is it a case of indemnity, but that of a promise made to a stranger. The contract is between Reader and Kingham,—"If you, Reader, will abstain from arresting Hitchcock, I will pay you 17*l.*" It was contended by the counsel for the defendant that Reader was the agent of Malins. But the answer is, that the transaction was not for his benefit, and he has not recognised Reader's act. The rule must be absolute.

KEATING, J.—I am of the same opinion. I have been much struck with the arguments urged by Mr. *Lush* and Mr. *Hannen*. But, upon the whole, I think the balance of authority is clearly in favour of the proposition, that, to bring the case within the Statute of Frauds, the promise must be made to the original creditor. Certainly some of the cases which have been referred to tend to throw some doubt upon the proposition. But, to hold this case to be within the statute, we must be prepared to overrule several very distinct and well-recognised authorities. Rule absolute.(*a*)

(*a*) See Batson *v.* King, 4 Hurlst. & N. 739.†

The second clause of the fourth section of the Statute of Frauds, 29 Car. 2, c. 3, has been adopted without material alteration, either as a part of the common law brought over by the colonists from England or by legislative re-enactment, in all the United States; in Pennsylvania, so recently as April 26th 1855. The interpretation of this brief clause is one of the standing puzzles in hermeneutics. Its construction has called forth great legal ingenuity, and given birth to a multitude of cases. Various attempts have been made to analyze the decisions at successive stages in their accumulation, in order to found some sound classification of them. Serjeant Williams's note to Forth *v.* Stanton, 1 Saund. 211, sums up, with characteristic discrimination, the law as developed by the cases at that period; and Chief Justice Kent's decision in Leonard *v.* Vredenburgh, 8 Johns. (N. Y. 1811) 29, contains a leading classification of all the earlier cases upon this noted clause.

A distinction, which some of the later cases have magnified into the cardinal rule for bringing a case within or excluding it from the operation of the statute, is that the new consideration, which gives the character of originality to the promise and thus takes it out of the operation of the statute, must move to the promisor. It may move from the debtor as well as from the creditor. But a consideration which merely moves to the original debtor, though it is sufficient to support a promise on the part of the guarantor, makes the promise collateral, and brings it within the purview of the statute: Mallory *v.* Gillett, 7 Smith (N. Y. Court of Appeals, 1860) 412, in which case the opinion of the majority of the Court, delivered by

Chief Justice Comstock, displays a comprehensiveness of intellectual grasp and a professional skill in the elucidation of the cases which is calculated to excite the admiration of a lawyer. The conversion, however, of this distinction into the test by which to determine the application of the statute, has been thoroughly contested upon a careful analysis of all the decisions, English and American: Browne on Statute of Frauds, chapter 10, and the authorities, when the language of the Judges is interpreted, as it always must be, in subordination to the circumstances of the cases, do not justify an exclusive reliance upon a new consideration moving to the promisor, to take a case out of the statute. Something more decisive is required than a trifling consideration passing to the promisor; the character of guarantor must be changed, and that of a principal debtor substituted, in order to prevent the operation of the statute. This may be accomplished, among other ways, by transferring the fund out of which payment of the debt is to be made to the promisor. Thus, a delivery order for goods was given up by the importer on the promise of A., who bought the goods of the merchant for whom they were imported, to pay the importer's charges. As A. had become, by the purchase of the goods, the debtor, he was held liable on a verbal promise: Fitzgerald *v.* Dressler, 94 E. C. L. R. (1859) 885. So B. sold out his stock in a corporation, which was sufficient to give controlling power to the owner, who agreed to indemnify B. against all liability on his endorsements of the company's notes. Chief Justice Shaw considered this an original promise, inasmuch as the means of preventing the incurring of any liability or of discharging such as might be incurred on B.'s endorsements were placed at the buyer's disposal: Alger *v.* Scoville, 1 Gray (Mass. 1854) 391. It is unnecessary to repeat all the cases collected upon this subject by Mr. Browne in his treatise, *supra*. A few late cases are given: Emerson *v.* Slater, 22 How. (U. S. Supreme Court, 1859) 28; Thomas *v.* Dodge, 4 Cooley (Mich., 1860) 51; Jepherson *v.* Hunt, 2 Allen (Mass., 1861) 417; Perkins *v.* Littlefield, 5 Id. (1862) 370; Clapp *v.* Lawlin, 31 Conn. (1862) 95; Robinson *v.* Gilman, 6 Chandler (N. H., 1862) 485, and cases cited; Dyer *v.* Gibson, 16 Wis. (1863) 557.

The extinguishment of the original debt and the substitution of the promise in its stead, operates as a novation. This class constitutes a well-recognised exception to the statute. Goodman *v.* Chase, cited and explained in the principal case *arguendo*, is the leading authority upon this point: Anderson *v.* Davis, 9 Vt. (1837) 136; Curtis *v.* Brown, 5 Cush. (Mass. 1850) 488; Wood *v.* Corcoran, 1 Allen (Mass., 1861) 405; Quintard *v.* DeWolf, 34 Barb. (1861) 95; Williams *v.* Little, 6 Shaw (Vt., 1862) 323.

The principal case establishes that the promise must be made to the creditor. A promise to the debtor is not within the statute: Howard *v.* Coshow, 2 Whittelsey (Mo., 1862) 118; Fiske *v.* Mc Gregory, 3 Fogg (N. H., 1857) 414.

*358] *THE THAMES IRON WORKS AND SHIP BUILDING COMPANY v. THE ROYAL MAIL STEAM-PACKET COMPANY.

The declaration set out articles executed under the seals of the plaintiffs and defendants respectively (public companies), by which it was agreed, amongst other things, that the plaintiffs should build and complete fit for sea for the defendants two steam-vessels for a certain stipulated sum each, "such sum to be in full and entire satisfaction and payment for each such vessel with all her apparatus and conveniences, without any other extra or additional charge, expense, or demand whatsoever:" and it was provided, that, "if at any time during the building and completing of the said vessels, any alteration or alterations whatsoever in the building, construction, or fitting of either of the said vessels, or of her apparatus or conveniences, should be directed to be made by the surveyor or other person lawfully acting in that behalf on the part of the defendants, *such alteration or alterations should not be made by the plaintiffs unless on the authority of a letter signed by the secretary of the defendants' company, stating that the court of directors had directed such alterations to be made, and specifying the precise amount which the defendants would allow for the same,*" and that no such alteration should in any other respect affect the provisions of the contract. The declaration then went on to allege, that, during the progress of the works, the defendants required divers alterations to be made in the building and construction of the vessels, and also divers extra works beyond those specified in the agreement and the specification and drawings thereto annexed, and which could not be reasonably inferred therefrom as necessary; that the plaintiffs did accordingly make all the alterations so required as aforesaid to be made, and did all the extra works so ordered by the defendants as aforesaid, *and that the defendants discharged them the plaintiffs from the stipulation in the agreement that such alterations should not be so made unless on the authority of a letter signed by the secretary of the defendants' company, stating that the directors of the defendants' company had directed such alterations to be made, and specifying the precise amount which the defendants' company would allow for the same.* Averment, that the alterations amounted to a certain sum, and that the defendants refused to pay.

Plea, that there was no contract between the plaintiffs and the defendants relating to the said alterations other than the deed in the declaration mentioned, and that the alleged discharge was not a discharge by deed.

Replication, on equitable grounds, that, after the making of the deed in the plea mentioned, the defendants by parol, and without any letter signed by their secretary according to the stipulations of the agreement, required and authorized the plaintiffs to make the alterations, &c., and the plaintiffs, at the request and by the authority of the defendants, made the said alterations, and the defendants afterwards took to the vessels, and received and enjoyed, and still kept and enjoyed the benefit of the said alterations so made by the plaintiffs; and that, by reason of the premises, the plaintiffs were in equity discharged by the defendants from the stipulations in the declaration mentioned, and that the defendants ought not in equity to be allowed to set up the want of a discharge of the said stipulations by deed in bar of the plaintiffs' claim for the cost of the said alterations:—

Held, that the replication was bad, on demurrer, inasmuch as it contradicted the declaration, and showed that the plaintiffs' right, if any, was only an equitable one.

THE declaration stated, that, by certain articles of agreement made and executed under the seals of the plaintiffs and the defendants respectively, to wit, on the 3d of March, 1858, it was mutually agreed between the plaintiffs and their successors on the one part, and the defendants, their successors and assigns, of the other part, that the plaintiffs and their successors should build and complete in every *359] respect fit for *sea, for the defendants, their successors or assigns, with the best materials that could be obtained of their respective kinds, two good, staunch, and substantial steam-vessels, each to be of the burden of not less than 3092 tons builders' measurement, with apparatus, appurtenances, and conveniences of every kind, to correspond in every respect with a certain specification and drawings thereof annexed to the said articles of agreement, and signed by the secretaries or managers of the plaintiffs' and the defendants' com

panies respectively for the time being, so far as the same should be in such specification and drawings set out; the cabin accommodation of the said vessels to be laid out and completed in accordance with a drawing to be furnished by the secretary of the said Royal Mail Steam Packet Company on their behalf, and to be of the style of the Atrato and other ships of her class in the service of the defendants' company; and that one of the said vessels should be launched, rigged, and in a fit state to be navigated to Southampton, there to receive her engines, machinery, and boilers, on or before the 17th of October, 1858, and that the other of the said vessels should be launched, rigged, and in a fit state to be navigated to Southampton, there to receive her engines, machinery, and boilers, on or before the 17th of November, 1858; and that the said vessels should on the beforementioned days be respectively delivered over to the defendants, their successors or assigns, for the purpose of being navigated to and at the risk of the defendants to Southampton, and of having their engines, machinery, and boilers fitted on board there; and that they, the plaintiffs, or their successors, should and would do and complete all the work remaining to be done under the contract on board each of the said vessels after the said engines, machinery, and boilers should be fixed on board, within four weeks after the *said [*360
engines, machinery, and boilers should be certified to be fitted on board each such vessel by the surveyor for the time being of the defendants' company; and that each such vessel should be completed with all necessary shipwrights', joiners', painters', carvers', gilders', copper and other smiths' work, and, so completely fitted up, equipped, and ready for immediate sea-going service, should be actually delivered to the defendants, their successors or assigns, within the period of four weeks from the time when the said engines, machinery, and boilers should be so certified to be fitted on board as aforesaid; and that the time fixed for delivery of each of the said vessels to the defendants for navigation to Southampton as aforesaid, and for the completion and delivery of each of the said vessels as aforesaid, should be of the essence of that contract; and that the defendants' surveyor should have free access and facilities for inspection during the progress of the work: and it was further agreed, that, in consideration of the premises, the defendants or their successors should and would pay to the plaintiffs, their successors or assigns, as and for the price of each of the said steam-vessels so to be built, launched, and completed in every respect fit for sea as aforesaid, with all and singular the apparatus, appurtenances, and conveniences thereof (except engines, machinery, and boilers as aforesaid), the sum of 69,570*l.*, being at the rate of 22*l.* 10*s.* per ton,—it being agreed that each such vessel should measure not less than 3092 tons builders' measurement; and that such sum was therein declared and agreed to be in full and entire satisfaction and payment for each such vessel, with all her aforesaid apparatus, appurtenances, and conveniences, without any other extra or additional charge, expense, or demand whatsoever; which said sum of 69,570*l.* for each such ship was to be apportioned and paid as [*361
*follows, that is to say, &c. &c.: and it was further agreed, that, if either of the said vessels should not be delivered to the defendants, their successors or assigns, for navigation to Southampton, on the da-

limited in that behalf as thereinbefore mentioned, or should not be rigged, fitted up, equipped, furnished, and completed ready for delivery within the said period of four weeks thereinbefore mentioned, or, being so equipped, furnished, and completed ready for delivery, should not be delivered to the defendants, their successors or assigns, within such period, then the defendants, their successors or assigns, should be entitled to deduct from the price of the vessel or vessels which should not be so delivered to the defendants in a fit state for navigation to Southampton as aforesaid on the day fixed in that behalf, or which should not be so equipped, furnished, and completed ready for delivery, or should not be so tendered for delivery within the period thereinbefore limited in that behalf, the sum of 25*l.* per day for and in respect of each succeeding day during which the launching or the completion of the delivery of such ship as aforesaid should be delayed,—the deduction in respect of such delay in delivering the said ship for navigation to Southampton as aforesaid to be made out of the said fourth instalment payable under the said articles as thereinbefore mentioned in respect of such vessel, and the deduction in respect of the completion or non-delivery of such vessel to be retained out of the final payment to be made in respect thereof: and it was further provided, that, nevertheless, the aforesaid deduction should in no case be made if the default should be occasioned by any act, requirement, or default of the defendants, or by fire, and if notice should have been given by the defendants or their surveyors that the completion of the said vessel
*362] was being so delayed *by them at the time when such delay had actually taken place. [Then followed provisions as to the insurance of the vessels whilst building.] And it was further provided and agreed between and by the said parties hereto, that the said vessels should be navigated from the river Thames to Southampton at the expense and risk of the defendants, their successors and assigns, and that such last-mentioned company should pay all dock-dues and other expenses of the same kind which might become payable in consequence of the said vessels being completed at Southampton; and that the entire property in the said vessels whilst in the course of construction, and in the apparatus, chains, sails, cables, anchors, boats, masts, spars, timbers, stores, furniture, fittings, things, or materials, parts, or appurtenances provided or in course of construction, preparation, or manufacture for the purpose thereof, should, subject to the lien which the plaintiffs or their successors might have or acquire thereon for or in respect of so much of the price or consideration agreed to be paid for the same as aforesaid as they should from time to time be entitled to receive, always be and remain absolutely vested in the defendants' company, their successors or assigns: And it was further agreed and declared between and by the said parties, that if, at any time during the period of the building and completing of the said steam-vessels, or either previously to or after such steam-vessels should be ready for sea as aforesaid, any alteration or alterations whatsoever in the building, construction, or fitting of either of the said vessels, or any part thereof, or of her apparatus, appurtenances, or conveniences, whatsoever shall be directed to be made by the surveyor or other person or persons lawfully acting in

that behalf on the part of the defendants, their successors or assigns, *such alteration or alterations shall not be made by the *plaintiffs or their successors, unless on the authority of a letter signed by the secretary of the defendants' company stating that the court of directors of the said last-mentioned company had directed such alterations to be made, and specifying the precise amount which the said last-mentioned company will allow for the same;* and, in the event of the plaintiffs or their successors not being willing to make such alterations for such sum, they should be at liberty to decline doing so, provided they should signify they did so decline, and for what reason they so declined, within one week after they should receive such letter, otherwise it was thereby agreed that such alterations should be made accordingly by the plaintiffs or their successors for the sum so specified; and, in case any such alteration or alterations as aforesaid should be so directed as aforesaid, no additional term should be allowed for the launching or the completion and delivery of such vessel as aforesaid, unless the same should be expressly allowed in the letter to be required from the secretary of defendants' Company as aforesaid; and no such alteration should in any other respect affect the provisions of the present contract: And it was further agreed that any omission within the true intent and meaning of the said contract respecting the building or finishing of the said vessels which might occur in the specification and drawings thereinbefore mentioned, which might reasonably be inferred as necessary, should nevertheless be considered as in no way authorizing the omission of such matters in the performance of the said contract, but, on the contrary, the said vessels should be completed and fitted in every respect for sea to the satisfaction of the defendants, their successors and assigns, or their surveyor for the time being, and without any extra charge whatsoever to the said last-mentioned company beyond the sum thereinbefore agreed *to be paid for the said vessel, in respect of either shipwrights', caulkers', smiths', sawyers', joiners', carvers', gilders', plumbers', painters', glaziers', or any other work whatsoever. [Then followed other provisions not material to this action.] Averment, that, after the execution of the articles of agreement as above recited, the plaintiffs proceeded to build and complete, and did in fact build and complete, the two vessels so by the aforesaid contract contracted by them to be built and completed for the defendants; that, in this action, the plaintiffs were suing for the breach of contract by the defendants as thereinafter mentioned of the defendants' part of the said contract in respect of the second of the two ships so contracted for as aforesaid by the plaintiffs, which said second ship was thereinafter called the "Seine;" and, with respect to the said ship the "Seine," that, after the execution of the aforesaid articles of agreement, and before suit, they did accordingly build and complete the said vessel the "Seine" in all respects in accordance with the aforesaid articles of agreement and the specification and drawings thereunto annexed, and actually delivered the same so completed as aforesaid to the defendants, and the defendants accepted and took to the same; and that they the plaintiffs had fulfilled and performed all things by them to be fulfilled and performed, and all things had happened and been done, and all times had elapsed, necessary to entitle them to the performance by the

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defendants of their part of the said articles of agreement, and to entitle the plaintiffs to be paid for the said vessel by the defendants according to the terms of the said articles of agreement: Breach, that the defendants had not paid for the same, but had wholly refused so to do.

The sixth count stated, that, after the execution of the articles of agreement in the first count mentioned, and during the progress of the
*365] said works, the *defendants required divers alterations to be made in the building and construction of the said vessel, and also divers extra works beyond those specified in the said articles of agreement and the specification and drawings thereunto annexed, and which could not be reasonably inferred therefrom as necessary; that the plaintiffs did accordingly make all the alterations so required as aforesaid to be made, and did all the extra works so ordered by the defendants as aforesaid; that the defendants discharged them, the plaintiffs, from the stipulation in the said articles of agreement that such alterations should not be so made except on the authority of a letter signed by the secretary of the defendants' company stating that the directors of the defendants' company had directed such alterations to be made, and specifying the precise amount which the defendants' company would allow for the same; and that the cost of the said alterations and other works amounted to a large sum, to wit, 10,000*l.*, and though the plaintiffs had done everything and everything had happened, except as aforesaid, to entitle them to payment for the same, yet the defendants had not paid for the same, but wholly refused so to do.

Twenty-first plea, to the sixth count so far as it related to the claim in respect of the said alterations,—that the agreement in the first count mentioned was the deed both of the plaintiffs and of the defendants, and that there was no contract between the plaintiffs and the defendants relating to the said alterations, or any of them, other than the said deed, and that the alleged discharge in the sixth count mentioned was not a discharge by deed, and that the plaintiffs' claim in the sixth count, as to the said alterations, was founded on the said deed, and no other contract.

Replication to the twenty-first plea, on equitable grounds, that, after
*366] the making of the deed in the said *plea mentioned, the defendants, *by parol*, and *without any letter signed by their secretary* according to the stipulations of the said articles of agreement as in the sixth count mentioned, directed, required, and authorized the plaintiffs to make the alteration and do the extra works in the sixth count mentioned; and the plaintiffs, at the request and by the authority of the defendants, made the said alterations and works, and the defendants afterwards took the said ship, and received and enjoyed, and still kept and enjoyed, the benefit of the said alterations and works so made and done by the plaintiffs as aforesaid; that the plaintiffs had wholly done and performed all things which the defendants requested and required them to do, and nothing remained to be done on the part of the plaintiffs; and, by reason of the premises, the plaintiffs said that they were in equity discharged by the defendants from the stipulations in the sixth count mentioned, and the defendants ought not in equity to be allowed to set up the want of a discharge of the said stipula-

tion *by deed* in bar to the plaintiffs' claim for the cost of the said alterations and works.

To this replication, the defendants demurred, the ground of demurrer stated in the margin being, "that a discharge from the stipulations in the deed, coupled with the authority and request of the defendants to make the alterations, do not make the defendants liable to pay for those alterations any sum beyond the contract-price, there being no contract by which they undertook to pay more." Joinder.

Holland, in support of the demurrer.—This is an attempt on the part of the plaintiffs to set up an equitable claim to sustain an action where the record shows there is no claim at law. A dispensation by parol of a condition in an instrument under seal is *clearly no answer in a Court of law. In Sugden's Vendors and Purchasers, 9th edit. Vol. 1, p. 150, it is said: "Whether an absolute parol discharge of a written agreement, not followed by any other agreement upon which the parties have acted, can be set up even as a defence in equity, seems questionable. The result of the authorities as to a parol *variation* appears to be,—first, *that evidence of it is totally inadmissible at law*,—secondly, that, in equity, the most unequivocal proof of it will be expected." Here, there was no proof of any terms upon which the alterations were to be made. By the contract, the price was to be specified in the letter directing the alterations. The defendants have no means of testing the value of the alterations; and they may have been made for the plaintiffs' own satisfaction merely. [WILLES, J.—This amounts to a new contract, or it is nothing.] That is the only ground upon which a Court of equity would compel a specific performance. In Viner's Abridgment, *Contract and Agreement* (H.), pl. 38, is the following case:—"W. leased an house to N. for eleven years, and was to allow 20*l.* to be laid out in repairs; the agreement was reduced into writing signed and sealed by both parties; N. repaired the house, and, finding it to take a much greater sum than the 20*l.*, told W. of it, and that he would nevertheless go on, and lay out more money, if he would enlarge the term to twenty-one years, or add fourteen, or as many as N. should think fit. W. replied that they would not fall out about that, and after declared that he would enlarge the term, without mentioning any term in certain. Quære, whether this new agreement made by parol, which varied from the written agreement, should be carried into execution notwithstanding the Statute of Frauds? Master of Rolls said, that, before the statute, written *agreements could not be controlled by a parol agreement contrary to it or altering it: but this is a new agreement, and the laying out the money is a performance on one part, and ought to be carried into execution; and built his decree upon these cases,—1st, where a parol agreement was for a building lease, and before it was reduced into writing the lessee began to build, and after differing on the terms of the lease, the lessee brought a bill, and the lessor insisted on the Statute of Frauds; the Lord Keeper dismissed the bill; but the plaintiff was relieved in Dom. Proc.; and the second was a case in Lord Jefferies's time, MS. Rep. Mich. 4 Geo. Canc." That is confirmed by Sugden, p. 151. This, therefore, would in equity be considered as a new agreement, and therefore the plaintiffs are wrong in suing upon the original contract. There has been

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no default here on the part of the defendants. They take the ship as she is. This is not unlike the case of Munroe *v.* Butt, 8 Ellis & B. 738 (E. C. L. R. vol. 92). There, by a building agreement between A. and B., it was stipulated that A. should complete for a specified price certain work on certain houses of B., the whole to be completed on a specified day, and to be done to the satisfaction of a surveyor named, upon whose approval payment was to be made. A. failed to complete the work. He sued B. on the agreement for the agreed price, and on a common count for a reasonable price according to measure and value. There was evidence, on the trial, that B. had resumed possession of the houses, and was so far enjoying the fruits of A.'s labour. Upon a rule to set aside a nonsuit, and enter a verdict for the plaintiff, it was held that there was no evidence to go to the jury in support of the plaintiff's claim; for that he could not recover on the special count, not having fulfilled the contract; and that the
*369] mere fact of B.'s taking possession of his own land on which *buildings had been erected, or where repairs had been done or alterations made to a building thereon, did not afford an inference that he had dispensed with the conditions of the principal agreement under which the works were done, or of a contract to pay for the work actually done according to measure and value. The fact, therefore, of the defendants taking the ship was no evidence that they took it otherwise than under the original agreement. In Morgan *v.* Birnie, 9 Bing. 672 (E. C. L. R. vol. 23); 3 M. & Scott 76 (E. C. L. R. vol. 30), the defendant was to pay for a certain building upon receiving an architect's certificate that the work was done to his satisfaction; the architect checked the builder's charges, and sent them to the defendant; and it was held that this did not amount to such a certificate of satisfaction as to enable the builder to sue the defendant, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered. Rigby *v.* The Mayor, &c., of Bristol, 29 Law J., Exch. 359, is an authority to the same effect. So also is Scott *v.* The Corporation of Liverpool, 27 Law J., Ch. 641. There, the plaintiff contracted to do certain works for the Corporation of Liverpool; and the contract contained a proviso that no sum of money should be considered to be due and owing, nor should the plaintiff make any claim against or demand upon the corporation for or on account of any work executed by him, *unless the engineer of the corporation should certify the amount thereof and that the plaintiff was reasonably entitled thereto.* Erle, J., who was called to the assistance of the Vice-Chancellor, in delivering his opinion, says: "I think there is no evidence to support a claim by the plaintiffs to recover anything in respect either of the work done and the materials supplied before the 28th of February, 1855, or the plant taken by the
*370] defendants on that day, when the *contract was lawfully determined. The question refers to the contract and to the course of conduct of the parties thereto: and I would propose to consider,—first, the rights under the contract,—and, secondly, the effect of the conduct of the parties. By the contract it appears to me the engineer is interposed between the corporation and the contractors, and made the absolute judge of the performance of the works, and that there is no right in the contractors to demand payment, and no liability on

the corporation to pay, throughout the contract, unless the condition of obtaining a valuation by the engineer, and his certificate, has been fulfilled. I pass over with the mere mention the clauses giving to the engineer his powers in respect of the works, such as the absolute discretion over alterations and additions and the valuations of them, and the powers to inspect and reject materials and workmanship, and to suspend or delay the progress of any part of the works, and to settle about the extension of time: and I come to the clauses regulating the contractors' right to demand payment. The parties provide, first, for paying instalments during the progress of the works, and the balance on the final completion, and secondly, for compensating for the work and the plant taken, in case the contract should be terminated before completion. In the first case, that is, if the works progress to completion, the stipulation for the certificate is express. In paragraph 34, it is provided 'that no sum or sums of money shall be considered to be due and owing, nor shall the contractor make any claim against or demand upon the said corporation for or on account of any work executed by him, unless the said engineer shall certify the amount thereof and that the said contractor is reasonably entitled to such instalment or balance respectively.' This clause comprises [*371
*every right to payment, except in case of termination of the contract, and makes every right universally conditional upon obtaining the engineer's certificate." "The contract expressly defines the rights of the parties in the event that has happened; and the law can only enforce rights under a contract according to that contract." And Vice-Chancellor Stuart, in delivering judgment, said: "This case was heard before me with the assistance of Mr. Justice Erle. The opinion delivered by that very learned Judge is entirely unfavourable to the right of the plaintiffs to any relief in a Court of law; and there is no doubt whatever in my mind as to the soundness of that opinion. There remains, therefore, only the question whether there are any circumstances to entitle the plaintiff to relief in a Court of equity. This is not a case in which there has been on both sides, or on either side, such a course of conduct as amounts to a substitution of some other terms of agreement. The stipulations in this contract are of a most stringent kind, and expressed in very clear language. All the complaints as to delays of a vexatious kind in withholding the certificate, relate to matters which by the contract are left to the absolute discretion of the engineer. This Court has no right or power to impose upon either of the parties to the contract any other terms than those which they have prescribed for themselves, and by which they have agreed to be bound. It is of the very essence of the contract that no sum shall be considered due and owing to the plaintiffs on account of any of the works executed by them, unless the engineer shall certify the amount, and that all his directions, admeasurements, valuations, and awards shall be final and binding upon both parties to the contract." [WILLES, J., referred to Ranger *v.* The Great Western Railway Company, 5 House of Lords Cases 72.] The *decision of Vice-Chancellor Stuart in Scott *v.* The Corporation of [*372
Liverpool was affirmed by Lord Campbell, C., on appeal: 28 Law J., Ch. 230. "It appears to me," said his Lordship, "that within the contract itself there exists an invincible impediment to the relief which the

plaintiffs claim. It has been already seen, that, by the terms of the contract, the plaintiffs are precluded from all remedy at law until the certificate of the engineer has been obtained, or until he has fixed and determined the sum to which the plaintiffs are entitled for the works which they have done, the value of the plant and materials which were taken to by the corporation. This view of the case at law goes very far towards a similar decision in a Court of equity. There is no equitable construction of an agreement distinct from its legal construction. To construe is nothing more than to arrive at the meaning of the parties to an agreement; and this must be the aim and end of all Courts which are called upon to enforce any rights created by and growing out of contract." And see Story's Equitable Jurisprudence, §§ 759, 762, 767.

Lush, Q. C. (with whom was *Harcourt*), contrà.—The plaintiffs do not rely simply on the acceptance of the ship by the defendants. If the latter had not ordered the alterations and extra work to be done, the mere acceptance would not have charged them. But they required the alterations to be made, and expressly discharged the plaintiffs from the obligation imposed upon them by the contract, of obtaining the letter of their secretary. The question is, whether the plaintiffs are precluded from recovering the value of the alterations simply because the discharge is not by deed. [WILLES, J.—Lamprell *v.* The Billericay Union, 3 Exch. 283,† seems to be quite in point against you.] There *373] *was no equitable replication there: and it must be conceded that the plaintiffs' right to succeed here rests upon that. The replication here shows that it is inequitable to permit the defence suggested by the plea to be set up. [WILLES, J., referred to Brymer *v.* The Thames Haven Dock and Railway Company, 2 Exch. 549,† in error 5 Exch. 696.† WILLIAMS, J.—Is not the replication a departure?] Departure is no objection now. [WILLES, J.—In Farrand *v.* Berresford, 10 Clark & Fin. 319, departure was held to be a ground of objection on general demurrer.] An equitable replication must in every case be in a certain sense a departure: it is only wanted where the plea puts the plaintiff out of Court, but for the rule of equity precluding the defendant from setting up an unconscientious defence: Story, § 903. It is no objection that the declaration is thereby converted into a bill in equity. In De Pothonier *v.* De Mattos, E. B. & E. 461 (E. C. L. R. vol. 96), to a declaration by a shipowner upon a charter-party, for non-payment of freight by the charterer, and on a common count for money payable for freight and on an account stated, the defendant pleaded,—first, to the first count, a discharge before breach,—secondly, to the residue of the declaration, payment,—thirdly, to the whole declaration, on equitable grounds, a *parol* release of the plaintiff by the defendant after the accrual of the cause of action. To these pleas the plaintiff replied, on equitable grounds, that, before the cause of action accrued, and before the release or discharge of the defendant by the plaintiff, or payment, all the right, title, and interest of the plaintiff in the ship and in the charter-party were assigned to S., and then became, and remained, vested in him, of which the defendant had notice before the alleged release or discharge of the defendant by the plaintiff, or payment; that the plaintiff released and discharged

the *defendant and made the payment without the authority, knowledge, or consent of S.; that the release and discharge [*374 were given by the plaintiff to the defendant, and obtained by the defendant from the plaintiff, and the payment made, fraudulently and with the intent to defraud S. and prevent him from recovering in respect of the said causes of action, and that the action was brought by S. in the name of the plaintiff, on behalf of S.; that the plaintiff had no interest in the said action, and that it had been commenced and carried on for the sole use and benefit and at the sole expense and cost of S. And it was held, on demurrer, that this was a good replication on equitable grounds, within the 85th section of the Common Law Procedure Act, 1854. "The plea," said Erle, J., "is a legal answer to the nominal plaintiff, but not an equitable answer to the real plaintiff, the assignee: the replications avoid that plea upon equitable grounds, and are clearly within the provisions of the statute." [WILLES, J.—It is a great pity that the legislature did not go a little further, and give the Courts of law jurisdiction over equitable debts. BYLES, J.—In Reis *v.* The Scottish Equitable Assurance Company, 2 Exch. 19,† Pollock, C. B., says: "The Courts will not allow a plaintiff to put himself by an equitable replication in a better position than he would have been in if the whole matter had been set out in the declaration."] In Vorley *v.* Barrett, 1 C. B. N. S. 225, 239 (E. C. L. R. vol. 87), Cresswell, J., says: "I apprehend that it was the intention of the legislature, in making these provisions, to give the parties the benefit of an equitable answer or defence, without incurring the expense or inconvenience of going into a Court of equity. If, therefore, the case is one in which a Court of equity would relieve against the strict letter of the agreement, it is one in which we ought to give the judgment here for the *plaintiff." [*375 If there be equity enough to destroy the plea, that is enough to satisfy the statute. [BYLES, J.—That which shows that the defendant ought not to be allowed to plead this plea, shows at the same time that the plaintiff had no right to bring this action. In Hunter *v.* Gibbons, 1 Hurlst. & N. 459,† it was held, that, to a plea of the Statute of Limitations, in an action of trespass or trespass on the case, the plaintiff will not be allowed to reply as an equitable answer, that the trespasses, &c., were underground, and had been fraudulently concealed from the plaintiff till within six years before suit. WILLIAMS, J.—That is a very strong case.] The equitable replication now before the Court represents the bill which would be before the Court of equity. That, it is submitted, is what the legislature intended should be allowed. The authorities cited on behalf of the defendants have no application. Morgan *v.* Birnie, Scott *v.* The Corporation of Liverpool, and that class of cases, are clearly distinguishable. There, the parties by the terms of the contracts which they had entered into, had precluded themselves from suing, because they had not applied with the condition upon which alone they were entitled to payment. That condition was equally a bar to the claim in equity as to a claim at law.

Holland was not called upon to reply.

WILLIAMS, J.—I am of opinion that this replication is bad, and consequently that our judgment on this demurrer must be for the

defendant. I do not feel called upon to give any opinion as to whether or not the plaintiffs could under the circumstances obtain any relief in equity: but what we are called upon to decide, is,
*376] whether the count in question, as *explained by the replication, affords a ground of action in a Court of law. Now, the sixth count avers, that, after the execution of the articles of agreement in the first count mentioned, and during the progress of the works, the defendants required divers alterations to be made in the building and construction of the vessel, and also divers extra works beyond those specified in the said articles of agreement and the specification and drawings thereto annexed, and which could not be reasonably inferred therefrom as necessary, and that the plaintiffs did accordingly make all the alterations so required as aforesaid to be made, and did all the extra works so ordered by the defendants as aforesaid: and then it goes on to say that the defendants discharged the plaintiffs from the stipulation in such articles of agreement, that such alterations should not be so made except on the authority of a letter signed by the secretary of the defendants' company stating that the directors had directed such alterations to be made, and specifying the precise amount which the company would allow for the same. The effect of that is, that the plaintiffs rely upon a discharge given by the defendants as to one of the stipulations in the deed in which the contract between them is contained. It clearly could not be controverted, and indeed it has not been attempted to be controverted here, that such a discharge could only operate in a Court of law, if by deed. And although before the Common Law Procedure Act, 1852, one of the cases cited,—the Thames Haven Dock and Railway Company *v.* Brymer, 5 Exch. 696,†—shows that an allegation in a declaration or plea of a discharge from the stipulations in a deed, not averring such discharge to be by deed, would have been good on general demurrer, because the Court would presume it to have been by deed; yet, if the
*377] want of an allegation that it was by *deed had been made the subject of a special demurrer, the demurrer must have prevailed, and the plaintiff would have been barred of his action or put to amend by alleging the discharge to have been by deed. That being the state of the law before the passing of the first Common Law Procedure Act, could it have been contended that the plaintiff could have gone into a Court of equity to restrain the defendant from traversing the allegation in the declaration which made it necessary for the plaintiff to prove that the discharge was by deed? Clearly not. What, then, is the effect of the Common Law Procedure Act, 1854, upon that state of things? It certainly was not intended by the 85th section of that Act that the Courts of common law should be constituted Courts for the enforcement of equitable claims. The intention was, that, where a proceeding was already commenced in a Court of law, and there were circumstances which made it inequitable that the plaintiff should maintain his claim or the defendant his defence, the Court should have the means of doing justice between the parties without compelling them to have recourse to another tribunal. Inasmuch as the replication here must be taken as being introduced into the declaration, it cannot be read as alleging a discharge by deed; and thus we are remitted to the state of things which

existed before the passing of the Common Law Procedure Acts, and are bound to hold that the plaintiffs' claim is one which cannot be enforced in a Court of law.

WILLES, J.—I am of the same opinion. Whether or not a Court of equity would afford the plaintiffs relief under the circumstances appearing upon this record, it is unnecessary to offer any opinion. But it seems to me that the case differs entirely from those in which the Courts of equity are in the habit of giving relief in [*378 respect of claims sought to be enforced in Courts of law. Here, two parties agree, the one to build a ship and the other to pay for it, the contract (which is under seal) containing a stipulation, that, if during the building of the vessel any alterations should be directed to be made by the surveyor or other person acting on the part of the defendants, such alterations should not be made by the plaintiffs unless on the authority of a letter signed by the secretary of the defendants' company, stating that the court of directors had directed such alterations to be made, and specifying the amount which they would allow for them. Such is the contract which the parties have entered into under seal: and under that, the party who is to do the work, is precluded from making any charge for alterations, unless the order is given for them in the manner pointed out. To my mind that does not necessarily exclude the supposition, that, notwithstanding that contract, the parties may in the course of carrying it out agree that the provision in the deed as to the alterations shall be disregarded. But that does not, I apprehend, enable the plaintiffs to set up a new right of action or claim on the deed. It does not give any right in respect of which the plaintiffs may establish a specialty debt; but a right upon a new contract to be implied from the circumstances. Looking at the matter in this light, I should have thought, that, unless the circumstances were such as that a new contract for the alterations could be implied, there could be no claim in equity by the one party against the other in respect of them. And it is extremely reasonable that a party should not be made liable for alterations and extras, in the absence of some contract. Lord Tenterden laid it down in one case,—Lovelock *v.* King, 1 M. & Rob. 60, —upon general grounds which are equally applicable at law and in equity, that, where there is a *contract for work to be done for [*379 a specified price, and deviations and alterations from the original plan are made, such deviations and alterations, though ordered by the employer, cannot be charged for as extras unless the party was informed at the time that they would lead to an expense beyond the contract price; in which case an agreement to pay for them might be implied. Unless such a contract can be implied, I cannot conceive any ground upon which the builder can sustain a claim to be paid for the alterations. If there had been any such contract here, the plaintiffs might have declared upon it. I cannot read the sixth count as alleging a new contract of that sort, or as averring any undertaking by the defendants to pay for the alterations and additional work, otherwise than that which is to be found in the original contract contained in the deed mentioned in the first count. Then, according to the general rule of law, a stipulation in a deed can only be dispensed with by an instrument under seal. The declaration, when it alleges a dispensa-

tion, must be understood as alleging it to be under seal. A plea, therefore, traversing that there was a dispensation by deed, is a good plea. Then, the replication in effect says that the defendants ought not in equity to be allowed to set up the want of a dispensation by deed, because they waived the performance of that condition. This replication, like the sixth count, fails to set up any new contract under which the defendants were to pay for the alterations and extra work; and, if it is to be sustained at all, it must be on the ground that the plaintiffs are entitled to recover the price of the alterations and extras under the deed, although they have not performed the stipulations on their part contained in the deed, and although there has been no dispensation by deed, because a Court of equity would, under the
*380] circumstances disclosed upon *this record, restrain the defendants from relying for a defence upon the want of a deed. All I can say to that, is, that the replication departs in a substantial manner from the declaration,—it contradicts the contract declared on. I entirely concur in the observations made by my Brother Bramwell in Hunter v. Gibbons, 1 Hurlst. & N. 459,† as to the effect of a replication of fraud. That affords a very apt illustration of this case, though not so strong a case in its circumstances as the present. The reasoning of that learned Judge is still more applicable where the plaintiff is unable in his replication to state facts which make out a primâ facie claim to relief in equity. In the case of De Pothonier v. De Mattos, 1 E. B. & E. 461 (E. C. L. R. vol. 96), the statement in the declaration was true; and the defendant by his pleas set up grounds of defence which the replication showed it would be manifestly inequitable to permit the defendant to set up. However much it may be to some persons a matter of regret that the Courts of common law have not jurisdiction over all debts, whether legal or equitable, it is certain that the legislature has not given them such jurisdiction.

Byles, J.—I am of the same opinion. It occurred to me very early in the argument, that this was not a question whether the case was one for equitable relief, but whether it was a case in which an action would lie. I am not qualified to say whether or not the plaintiffs would be entitled to relief in equity; but, assuming that they are so, all that this replication shows, is, that the plaintiffs are entitled to some equitable relief, and that they never had any right of action at all. That seems to me to be the result of this record, taking the declaration, the plea, and the replication together. If we were to decide in favour of the plaintiffs, we should be going very far beyond
*381] the *power conferred upon us by the 85th section of the Common Law Procedure Act, 1854. The case of De Pothonier v. De Mattos, 1 E. B. & E. 461 (E. C. L. R. vol. 96), is plainly distinguishable; for, there, the effect of the replication was, to remit the plaintiff to the legal claim of right alleged in his declaration. Here, the plaintiffs have not and never had any legal cause of action.

Judgment for the defendants.

XENOS *v.* WICKHAM. *July* 12.

One L., an insurance-broker, as agent for the plaintiff, gave instructions for a policy for 2000*l.*, on the ship Leonidas belonging to the plaintiff, to be prepared by the defendants, an incorporated insurance company. Before the policy was ready, the plaintiff changed his mind, and directed L. to effect a policy for 1000*l.* instead of 2000*l.*, and upon somewhat different terms. L. accordingly delivered a second slip to the company, pursuant to the last instructions, and was debited by them with the premium in the usual way, but did not pay it; and shortly afterwards a policy for 1000*l.*, duly sealed by the company, was tendered to a clerk of L., who declined to receive it, saying that it was a mistake and that the insurance on the Leonidas was cancelled: whereupon the company's clerk took back the policy and endorsed upon it the following note,—"Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto"—

Held, that, under the circumstances, there having been no complete delivery of the policy, the company never became liable thereon.

THIS was an action brought by the plaintiff, who traded under the name of The Greek and Oriental Steam Navigation Company, against the defendant, the chairman of The Victoria Fire and Marine Insurance Company, upon a policy for 1000*l.* for twelve months, from the 25th of April, 1861, to the 24th of April, 1862, on the ship Leonidas, valued at 13,000*l.*

The declaration was in the usual form, averring a total loss.

The defendant pleaded, amongst other pleas,—first, that the said Victoria Fire and Marine Insurance Company did not become insurers as alleged,—fourthly, that, after the making of the said policy of insurance, the same remained, with the consent of the *plaintiff, in the hands of the said Victoria Fire and Marine [*382
Insurance Company; that, afterwards, whilst the said policy so remained in the hands of the said insurance company, and long before the happening of the said loss, the plaintiff requested the said insurance company, with the view and for the purpose of putting an end to the said policy, and of terminating the risk and liability of the said insurance company thereunder, to cancel the said policy, and to make a return to the plaintiff of the said premium paid by the plaintiff; that the said insurance company thereupon, in compliance with the said request, and long before the happening of the said loss, and in order to put an end to the said policy and terminate all risk and liability of the said insurance company thereunder, did accordingly cancel the said policy and return the said premium to the plaintiff, and thereby, and before the said loss, terminated and put an end to all risk and liability of the said insurance company under the said policy. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows:—The plaintiff, being desirous of effecting a policy for 2000*l.* with the Victoria Fire and Marine Insurance Company upon the ship Leonidas for the season, instructed one Lascaridi, his broker, to get it done. Lascaridi accordingly, on the 25th of April, 1861, handed the company a slip in the usual way. The insurance companies prepare their own policies; and the practice is to deliver them out when the premiums are paid. The plaintiff subsequently wishing to substitute for the 2000*l.* policy a policy for 1000*l.* for a year, Lascaridi on the 29th of April handed another slip to the com-

pany, and requested them to prepare another policy in accordance with this second slip, in lieu of the policy first ordered. *Lascaridi
*383] was accordingly debited by the Company with the premium on a 1000*l.* policy, and a debit-note was sent to him, and he drew upon the plaintiff for the amount. A policy in accordance with this second slip was afterwards sent by the defendants' company to Lascaridi's office; when Lascaridi's clerk declined to receive it, saying that the insurance upon the Leonidas had been cancelled. The company's clerk accordingly took back the policy, and endorsed upon it the following:—

"Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto:

"£1000 at 10 guineas per cent . .	£105	0	0
"Less 5 per cent.	5	0	0
	100	0	0
"10 per cent. . . .	10	0	0
"London, 14th June, 1861	£90	0	0

The above memorandum was signed by the directors and secretary of the defendant's company, and the policy so cancelled was redelivered at Lascaridi's office, and there left.

The Leonidas being lost, the plaintiff brought this action on the policy, insisting that the cancellation of the 1000*l.* policy was a mistake.

It was objected, on the part of the defendant, that there was no complete contract of insurance,—the company being an incorporated company, and not bound by the slip, and the policy under the seal of the company never having been delivered and accepted on the part of the plaintiff; and, further, that, if there was a complete delivery of the policy, it had been regularly cancelled with the consent of a duly authorized agent of the plaintiff.

His Lordship left it to the jury to say whether the *policy
*384] had been delivered out so as to constitute a binding contract; telling them, that, if they believed the evidence for the defendant, that Lascaridi applied to have that policy cancelled, they should find for the defendant.

The jury thereupon returned a verdict for the defendant.

Honyman, in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiff, pursuant to leave reserved, on the ground that the Chief Justice ought to have told the jury that there was no cancellation of the policy binding on the plaintiff, that, under the circumstances, Lascaridi's clerk had no authority to assent to a return of the premium and the cancellation of the policy, and that the acts of Lascaridi and his clerk were not binding on the plaintiff.(*a*)

Bovill, Q. C., and *Archibald*, showed cause.—There clearly never was any complete insurance. The policy was never *delivered* either to the plaintiff or to any person authorized to receive it for him. In Sheppard's Touchstone, p. 57, it is said: "The fifth thing required

(*a*) He also moved for a new trial as for a verdict against evidence: but this was refused, the Lord Chief Justice expressing himself not dissatisfied with the verdict.

in every well made deed, is, that there be a delivery of it. And for this it must be known that delivery is either actual, *i. e.* by doing something and saying nothing, or else verbal, *i. e.* by saying something, and doing nothing; or it may be by both: and either of those may make a good delivery and a perfect deed. But by one or both of these it must be made; for, otherwise, albeit it be never so well sealed and written, yet is the deed of no force. And, though the party to whom it is made take it to himself, or happen to get it *into his hands, [*385 yet will it do him no good, nor him that made it any hurt, until it be delivered. And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent, for omnis ratihabitio mandato æquiparatur. And when it is delivered by another that hath a good authority and doth pursue it, it is as good a deed as if it were delivered by the party himself; but, if he do not pursue his authority, then it is otherwise. And therefore, if a deed, or the contents thereof, be read or declared to a man that is to seal it, and he (being illiterate) doth deliver it to a stranger and bid him examine it, and, if it be so as it was read to him, then to deliver it as his deed, otherwise to re-deliver it to him again that made it; in this case, if the deed be in truth otherwise than it was read, and yet notwithstanding he to whom it was delivered doth deliver it to him to whom it is made, this delivery shall not avail, neither is the deed by this delivery become a good deed. And so also a deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him: or it may be delivered to any stranger for and in the behalf and to the use of him to whom it is made, without authority. But, if it be delivered to a stranger without any such declaration, intention, or intimation, unless it be in case where it is delivered as an escrow, it seems this is not a sufficient delivery." So, in Co. Litt. 36 a, it is said: "If a man deliver a writing sealed, to the partie to whom it is made, as an escrow, to be his deed upon certaine conditions, &c., this is an absolute deliverie of the deed, being made to the partie himself, for the delivery is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed), and tradition is only requisite, and then when the words are contrarie to the act which, is *the deliverie, [*386 the words are of none effect,—Non quod dictum est, sed quod factum est inspicitur." In Doe d. Garmons *v.* Knight, 5 B. & C. 671 (E. C. L. R. vol. 11), 8 D. & R. 348 (E. C. L. R. vol. 16), the grantor parted with all control over the deed. Then, as to the cancellation, —that Lascaridi had authority as agent for the plaintiff to cancel the slip for 2000*l.*, is conceded: and there was abundant evidence to warrant the jury in inferring that he had a general authority to cancel as well as to effect policies. It is to the broker alone that the underwriter or the insurance office in all cases looks. At all events, if that point becomes important, and the Court should be against the defendant upon it, it will only go to a new trial.

Lush, Q. C., and *Honymam*, in support of the rule.—It is admitted that Xenos never authorized or knew of the cancellation, and that he had paid Lascaridi the amount of premium on this policy. It further appears that Lascaridi never intended to have this policy cancelled;

but that what took place between the respective clerks of Lascaridi and the company, was a mere mistake. It is a mistake also to say that the company intended to withhold the policy until the premium was paid: it is the custom for insurance companies and underwriters to settle accounts with the brokers monthly. [ERLE, C. J.—Nobody asked a question as to what the company intended, beyond what the documents showed.] The cancellation assumes that the document was a perfect deed. Whether the premium was paid or not, is quite immaterial; the company having giving Lascaridi credit, and the plaintiff having paid him. In Arnould on Insurance, 2d edit. 121, it is said: "In our common forms of policy, the underwriters expressly acknowledge the receipt of the premium from the assured,—'*confessing ourselves paid the consideration due unto us for the assurance by* *387] **the assured.*' It is now clearly established that this acknowledgement, except in cases of manifest fraud, is conclusively binding on the underwriter, precluding him alike from suing the assured himself for unpaid premiums credited in his account with the broker, or from setting off such premiums to an action brought by the assured himself on the policy.(*a*) Even where the policy (as is the case of those of the Indemnity Mutual Marine) contains no such acknowledgment as is to be found in the common printed form, but instead thereof a covenant by the broker to pay the premium to the underwriter, the Courts will not imply a contract by the assured to pay the premium to the underwriter, in the face not only of this express stipulation, but also of the general mercantile usage in this country, according to which the underwriter looks not to the assured, but to the broker, as his debtor."(*b*) Here, the policy is in the ordinary form. [BYLES, J.—I see no evidence that this was the deed of the defendant. A man cannot execute a deed by attorney, unless the attorney be appointed under seal. This is a *contract*, which is evidenced by a sealed instrument.(*c*)] The allegation is not that the *defendant* made a policy; but that the company made a policy. If they had not made out a policy, the plaintiff could not have sued upon the contract on the slip. But they did make out a policy, which the plaintiff might have had at any time on demand. If the contract is intended to be complete, it is immaterial whether the grantor retains the deed in his possession or not. Bayley, J., in *388] delivering the judgment of *the Court in Doe d. Garmons *v.* Knight,—after referring to Barlow *v.* Heneage, Pre. Ch. 211, Clavering *v.* Clavering, Pre. Ch. 235, 2 Vern. 473, 1 Bro. P. C. 122, Naldred *v.* Gilham, 1 P. Wms. 577, and Boughton *v.* Boughton, 1 Atk. 625, —says (5 B. & C. 692 (E. C. L. R. vol. 11)): "Upon these authorities, it seems to me, that, where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately,—that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential." Then assuming that the com-

(*a*) See Dalzell *v.* Mair, 1 Campb. 532; De Gaminde *v.* Pigou, 4 Taunt. 246.

(*b*) See Power *v.* Butcher, 10 B. & C. 329 (E. C. L. R. vol. 21), 5 M. & R. 327.

(*c*) The company was established under an Act of Parliament in Victoria, with power to sue and be sued in the name of the chairman for the time being.

pany had made out a policy, and that by accident it had not been delivered out, because not called for,—is the plaintiff bound by the act of cancellation caused by the mistake of the broker's clerk? The broker, Lascaridi, would have no right *intentionally* to cancel the policy, as against his principal. [WILLES, J.—Clearly not, if the principal's name is in the policy, as here. Between the slip and the making out of the policy, the underwriter, it seems, has a right to deal with the broker. But, as soon as the policy is executed, another state of things arises.] The authority of the broker, it is submitted, is at an end when the slip is signed, unless he is to get the policy effected in his own name. As soon as the contract to insure is complete, the broker's authority is at an end. [WILLES, J.—You take a distinction, then, between an ordinary policy by underwriters, and a policy effected with an insurance company?] Yes. In the latter case, the policy being made out by the company, the broker's duty is at an end. In the ordinary case of a broker, he has no power to rescind a contract after the exchange of the bought and sold notes; and there is no reason why a different rule should prevail in the case of an *insurance-broker. [BYLES, J.—In the case of an ordinary broker, his authority is at an end so soon as the contract is [*389 complete.] Suppose Xenos had sued the company in trover for the policy, what answer could they have set up? Could they have claimed a right to retain it, on the ground that the broker had not paid the premium? There clearly never was any intention to cancel this policy. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the Court.

The plaintiff in this case traded under the firm of The Greek and Oriental Steam Navigation Company. The defendant was the chairman of the Victoria Fire and Marine Insurance Company, and represented that company on this record.

The action was founded on a time-policy of insurance alleged to have been effected by the plaintiff with the company for 1000*l.* for twelve months, on the ship Leonidas, valued at 13,000*l.* The verdict passed for the defendant; and the question reserved at the trial was, whether the policy, which purported to be under the seal of the company, had ever been executed, or, if executed, had been cancelled. The pleadings raised both defences.

It appeared that a gentleman of the name of Lascaridi was the insurance-broker of the plaintiff, and acted as his agent. He had originally, by the plaintiff's directions, instructed the company to prepare a policy for 2000*l.* on the Leonidas, for the season. A slip to that effect had been made out on the 25th of April, 1861, and signed with the initials of the company's broker. Afterwards, the plaintiff having altered his intentions Lascaridi instructed the company to prepare instead thereof another policy for 1000*l.* on the same ship, for a year. A second slip was *accordingly made out for [*390 1000*l.* for a year. Lascaridi was debited by the company with the premium, and a debit-note sent to him.

In due course, the policy in accordance with this second agreement was sent by the company to Lascaridi's office. But Lascaridi's clerk stated that it was a mistake, that no premium was owing, and that the insurance on the Leonidas was cancelled. The company's clerk

accordingly took back the policy, and stamped on the back of it these words:—

"Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto:

"£1000 at 10 guineas per cent. . .	£105	0	0
"Less 5 per cent.	5	0	0
	100	0	0
"10 per cent. . . .	10	0	0
	"£90	0	0

"London, 14th June, 1861."

This memorandum was signed by the directors and secretary, and the policy so cancelled was re-delivered at Lascaridi's office, and there left, and was retained by him till the questions now in dispute arose.

The vessel being eventually lost, Lascaridi then insisted that the second policy had been cancelled by mistake; and the plaintiff brought the present action thereon.

We are of opinion that the policy upon which the action is founded is not a binding instrument.

It is material to observe that Lascaridi was not only the agent of the plaintiff in this transaction, intrusted with the entire negotiation of the contract from first to last, but that, on the first occasion, Lascardi had given directions for the alteration of the contract, and *391] *the company had altered it accordingly. The company, therefore, had a right to suppose Lascaridi to be invested with full powers from the beginning to the end of the transaction, both with respect to the preliminary contract and the policy to be founded thereon.

It appears to us that this policy was never perfectly delivered so as to vest a right of action in the plaintiff. When any instrument, whether a formal deed or any other written contract, is executed and handed by the maker to the other party, primâ facie that is a delivery, and the estate, or right of action, or other thing thereby legally granted or created, passes to the grantee. But all this is on the assumption that the grantee accepts the delivery, and accepts the benefit, which he is presumed to do. It is otherwise when he at the time and place of delivery repudiates the delivery and disclaims the benefit (Sheppard's Touchstone 285; Thompson *v.* Leech, 2 Ventr. 198; Townson *v.* Tickell, 3 B. & Ald. 41 (E. C. L. R. vol. 5); Nicholson *v.* Wordsworth, 3 Swanst. 365, 371); especially when that repudiation and disclaimer is then and there acquiesced in by the grantor, and the instrument taken back by him; for, a man cannot by act of the parties have an estate or a right thrust upon him against his will. There is here a tender of delivery rather than a complete delivery.

If it be said that Lascaridi was bound to accept the policy, the answer is, first, that at least so far as the company had the opportunity of knowing, Lascaridi had as much authority to vary or cancel the second executory agreement for a policy as the first; and secondly

that Lascaridi's negligence and mistake has altered the position of the company.

If it be objected that at all events the original executory contract for the last insurance remains, the answer is, first, that the plaintiff has not declared on the executory contract; next, that, if he had done so, *the company have been guilty of no breach, for [*392 they have tendered the policy; and, lastly, that that executory contract has been rescinded by mutual consent before breach.

We therefore think the verdict for the defendant right, and that this rule must be discharged. Rule discharged.

HERMANN *v.* SENESCHAL. *May* 29.

In order to entitle a party to a notice of action for a thing done "in pursuance of" the 24 & 25 Vict. c. 99 (the act for the consolidation of the law against offences relating to the coin), it is enough that he *honestly* and bonâ fide believes he is acting in pursuance of the act,—whether there be *reasonable* ground for such belief or not.

THIS was an action for an assault and false imprisonment. The defendant pleaded "not guilty, by statute,"—the reference in the margin being to the Act to consolidate the law against offences relating to the coin, 24 & 25 Vict. c. 99, ss. 9, 31, 33.(*a*)

*The cause was tried before Byles, J., at the sittings in [*393 London after last Hilary Term. The facts were as follows: On

(*a*) The 9th section enacts that "whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement."

The 31st section enacts that "it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence against this act, and to convey or deliver him to some peace-officer, constable, or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law."

The 33d section enacts that "all actions and prosecutions to be commenced against any person for anything done in pursuance of this act, shall, in England or Ireland, be laid and tried in the county where the fact was committed, and shall, in England, Ireland, or Scotland, be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant or defender one month at least before the commencement of the action; and in any such action brought in England or Ireland the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and in Scotland the defender may insist on all relevant defences; and no plaintiff or pursuer shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court after such action brought by or on behalf of the defendant or defender; and if, in England or Ireland, a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, or if, in Scotland, the verdict shall be for the defender, or if the pursuer shall abandon the action, or the Court shall dismiss it as irrelevant or improperly laid, in every such case the defendant or defender shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant or defender has by law in other cases; and though a verdict shall be given for the plaintiff or pursuer in any such action, such plaintiff or pursuer shall not have costs against the defendant or defender, unless the judge before whom the trial shall be shall certify his approbation of the action."

the 4th of January last, the plaintiff went into the shop of the defendant, a tobacconist, and purchased a cigar, the price of which was 2*d*. According to the plaintiff's statement, he put down on the
*394] counter a shilling, and received in change a *sixpence and a four-penny piece. According to the defendant's statement, the coin which the plaintiff gave him was a florin, and the change consisted of a shilling, a sixpence, and a four-penny piece.

The plaintiff having left the shop, the defendant followed him, and charged him with having given him a counterfeit florin, and gave him into the custody of a police-constable, who took him to the police-station. On the hearing before the magistrate, the charge not being considered to be sufficiently proved, the plaintiff was dismissed. No notice of action had been given.

The learned Judge left it to the jury to say,—first, whether the defendant *honestly* believed that the plaintiff had been guilty of the offence he charged him with, and that he, the defendant, in doing as he did, was exercising the power conferred upon him by the statute, —secondly, whether the defendant *reasonably* believed that the plaintiff was guilty of the offence.

The jury found that the defendant bonâ fide intended to act in pursuance of the power conferred by the statute, but that he had no reasonable ground for believing that the plaintiff had been guilty of the offence charged: and they assessed the damages at 5*l*.

The learned Judge directed a verdict to be entered for the plaintiff for that sum, and reserved leave to the defendant to move to enter the verdict for him, if the Court should be of opinion that he was entitled to notice of action.

Petersdorff, Serjt., in Easter Term last obtained a rule nisi accordingly.

Shaw showed cause.—The question is whether bonâ fide belief on the part of the defendant is enough to entitle him to the benefit of the Act although he had no reasonable ground for his belief; or, in other
*395] words, *whether a man can be said to be acting *in pursuance of* the Act, when he has no reasonable ground for believing that an offence against the Act has been committed. The jury here have found that the defendant acted bonâ fide, but that he had no reasonable cause for believing that the plaintiff had committed an offence against the Act. [WILLES, J.—If Read *v.* Coker, 13 C. B. 850 (E. C. L. R. vol. 76), be law, the true question is, not whether the defendant had reasonable cause for believing, but whether he bonâ fide believed. It was there held, that, in order to entitle a party to notice of action for a thing done "in pursuance" or "in the execution" of an Act of Parliament, it is not necessary that he should, at the time of doing the act be cognisant of the existence of the statute giving him such protection, or that he should be acting strictly in the execution of it.] The words of the Acts for the protection of constables and justices, 24 G. 2, c. 44, s. 6, and 11 & 12 Vict. c. 44, s. 1, —are somewhat different from those used here. In the former Act they are, "for anything done in obedience to any warrant," &c.; and in the 11 & 12 Vict. c. 44, s. 1, they are, "for any act done by him in the execution of his duty as such justice:" whereas, here the words are, "for anything done in pursuance of this Act." In Parton *v.*

Williams, 3 B. & Ald. 330, it was held that a constable who, acting under a warrant commanding him to take the goods of A., takes the goods of B., believing them to belong to A., is entitled to the protection of the 24 G. 2, c. 44, s. 8. So, in Gosden *v.* Elphick, 4 Exch. 445,† it was again held that a constable who acts bonâ fide, believing that he is doing his duty, is, though mistaken, within the protection of the 24 G. 2, c. 44, s. 8, and it is not a question for the jury whether the facts were such as might reasonably lead him to think he was so acting. In Wedge *v.* Berkeley, 6 Ad. & E. 663 (E. C. L. R. vol. 33), 1 N. & *P. 665, it was held, that, under the 24 G. 2, c. 44, s. 1, a magistrate sued for detaining goods on suspicion of felony, [*396 is entitled to notice of action, if he proceeded under a bonâ fide belief that he was executing his duty, although it be proved that he had no reasonable ground of suspicion; and that the bona fides, as well as the reasonableness of the suspicion, is a question for the jury. The 138th section of the County Courts Act, 9 & 10 Vict. c. 95, enacts, that, in actions and prosecutions to be commenced against any person for anything done *in pursuance of the Act*, notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action. In Booth *v.* Clive, 10 C. B. 827 (E. C. L. R. vol. 70), in a case against the Judge of a County Court for making an order for committing the plaintiff to gaol for disobedience of an order for payment of certain instalments, after due service upon him of a writ of prohibition, the jury were told,—and properly, it was held,—that, if the defendant acted under a bonâ fide belief that his duty as Judge of the County Court rendered it incumbent on him to do so notwithstanding the prohibition, the act must be considered as done in pursuance of the County Court Act, and he was entitled to notice of action. [WILLIAMS, J.—Speaking of that case, Maule, J., in Read *v.* Coker, 13 C. B. 863 (E. C. L. R. vol. 76), says it "decides that a party is entitled to notice of action provided he has acted bonâ fide in the belief that he is pursuing the statute, even though there may be no reasonable foundation for such belief:" and then he goes on,—"Where the question is, whether or not a man has acted bonâ fide, the reasonableness of the ground of belief may be fit to be considered; for instance, suppose a man who is an utter stranger to the transaction conducts himself in a manner which the law authorizes only in one filling a *particular character,—as, where a man assumes to act as a police-officer when he is not a police-officer,—it may be said [*397 that there is no evidence to go to the jury of his having acted bonâ fide. But here the jury have found that the defendant was pursuing a course which the law laid open to him, though he did not exactly pursue it with success."] In Jones *v.* Howell, 29 Law J., Exch. 19, the question of bona fides only was left to the jury; and the Court held the direction sufficient. [WILLIAMS, J., referred to Arnold *v.* Hamel, 9 Exch. 404.† The 8 & 9 Vict. c. 87, s. 117, enacts that "no writ shall be sued out against, nor a copy of any process served upon, any person acting under the direction of the commissioners of customs, for anything done in the execution of or by reason of his office, until one calendar month after notice in writing:" and s. 118 provides that "no plaintiff in any case when an action shall be grounded

on any such act done by the defendant, shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice to be given as aforesaid:" and it was held, that, under these enactments, it is the province of the Judge to decide whether notice of action is necessary; and, for that purpose, he should hear evidence on both sides, so as to enable him to determine whether the defendant was an officer of the customs acting by reason of his office, and under a reasonable belief that his duty as such officer required him to act as he did. Parke, B., there deals somewhat differently with Booth *v.* Clive. He says: "According to the authority of Booth *v.* Clive, the real question in all these cases, and the true principle by which they are governed, is this,—did the defendant reasonably believe that his duty as such officer required him to act as he did? reasonable belief being an ingredient in enabling the Court to arrive at a conclusion as to his *bona *398] fides."] To the same effect is Horn *v.* Thornborough, 3 Exch. 846,† where it was held that a person who causes the apprehension of another for a malicious trespass to property of which the former is the reversioner only, is entitled to notice of action under the Malicious Trespass Act, 7 & 8 G. 4, c. 30, if he causes such apprehension under the bonâ fide belief that he is acting in pursuance of the statute. Rolfe, B., there says: "I am reported to have said in Hughes *v.* Buckland, 15 M. & W. 346,† 3 D. L. 702,(*a*) and I have no doubt correctly, that 'all who bonâ fide and *reasonably* think they fill the character mentioned in the several statutes, and act in pursuance of them, are protected;' and that is a position which has been adopted by the Court of Queen's Bench. In fact, a man's reasonably believing himself to be the owner of the property injured in one ingredient in enabling us to arrive at the conclusion as to his bona fides." [ERLE, C. J.—Under the Malicious Trespass Act, where the party is acting for the protection of his own property, it may be that he must show reasonable ground for the belief that he is acting in pursuance of the Act.] The cases show that the party must, to entitle him to protection, have reasonable ground for believing that he is acting in pursuance of the Act, where he does not fill a privileged *character, Thus, in Cann *v.* Clipperton, 10 Ad. & E. 582 (E. C. *399] L. R. vol. 37), 2 P. & D. 560, it was held, that, where a statutory protection is given to persons having acted in pursuance of the statute, a party is not entitled to the protection merely because he believed bonâ fide that he was so acting: but there must be reasonable ground for the belief. "Perhaps," says Patteson, J., "none of the cases differ in principle from the decision we are now coming to: but single expressions are sometimes laid hold of, and too much insisted upon. It is not because a man chooses to think himself acting under a statute, that he can by such mere fancy of his own protect himself in

(*a*) In that case, the defendants, servants of Colonel Pennant, apprehended the plaintiff while fishing in the night-time near the mouth of the river Ogwen, in Carnarvonshire, in which river Colonel Pennant had a several fishery. In an action of trespass for this arrest, the defendants gave much evidence to show that Colonel Pennant's fishery included the place where the plaintiff was apprehended. The jury, however, defined the limits of the fishery so as to exclude the place by a few yards; but they also found that Colonel Pennant and his servants reasonably believed that it included that place: and it was held that the defendants were entitled to the protection of the statute 7 & 8 G. 4, c. 29, ss. 35, 63.

an action." And Williams, J., says: "It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute; for, no one can say what may possibly come into an individual's mind on such a subject. Still, protecting clauses, like that before us, would be useless if it were necessary that the person claiming their benefit should have acted quite rightly. The case to which they refer must lie between a mere foolish imagination and a perfect observance of the statute." [BYLES, J.—Kine *v.* Evershed, 10 Q. B. 143 (E. C. L. R. vol. 59), where it was held that the reasonableness of the belief ought to be left to the jury, was recognised in Arnold *v.* Hamel, 9 Exch. 404.†] Can a person who fills no privileged character, however bonâ fide his conduct may be, be said to act in pursuance of the Act, where he has no reasonable ground for believing that the Act justifies him in what he is doing? [ERLE, C. J.—If the party is acting in a judicial office, honest belief protects him: but, where he fills no office, he must not only bonâ fide believe, but he must act on reasonable grounds. BYLES, J., referred to West *v.* Baxendale, 9 C. B. 141 (E. C. L. R. vol. 67).]

**Petersdorff*, Serjt., and *Gifford*, in support of the rule.—The object of these protecting clauses, is, to encourage private individuals to become accusers where they bonâ fide believe the party to have been guilty of the offence. The clause now in question not only gives the defendant, in case he succeeds, his costs as between attorney and client, but it also deprives the plaintiff of costs though he succeeds in the action, unless the Judge shall certify his approbation of the action. These provisions would be altogether unavailing if the second proposition put to the jury here be held to be the correct one. It will be altogether changing the course of proof, and placing the defendant in the same position as if the action were brought for a malicious prosecution. The jury having found that the charge was made honestly, that, it is submitted, entitled the defendant to the verdict. In Cox *v.* Reid, 13 Q. B. 558 (E. C. L. R. vol. 66), to an action of trespass for assault and false imprisonment, the defendants pleaded "not guilty, by statute," relying on the Game Act, 1 & 2 W. 4, c. 32, s. 31. Parke, B., left it in substance as it was left here,—whether or not the defendants believed they were acting in pursuance of the statute, and, if so, whether they had reasonable grounds for so believing. The jury found that the defendants thought they were acting in pursuance of the statute; whereupon the learned Judge directed a nonsuit, for want of a month's notice of action, according to s. 47. And the Court held the question of reasonable or not reasonable belief in this case was a question simply whether there was such bona fides as entitled the defendants to notice of action, and that the case was properly left to the jury. [ERLE, C. J.—The statute did not authorize Reid to take the plaintiff's gun: and the court are supposed to have held, that, if he *imagined* that the statute authorized him to do as he did, he was within the protection of s. *47! The discrepancies between the report in 13 Q. B. 558 (E. C. L. R. vol. 66), and that in 18 Law J., Q. B. 216, coupled with the fact that the Court do not seem to have grappled with the difficulty, render that a case not much to be relied on.] In Reid *v.* Coker, 22 Law J., C. P. 203, Maule, J., says:

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"The protection given by the act is intended for those who are in the wrong. A person who acts perfectly right needs no protection." [ERLE, C. J.—The circumstances there were such as might fairly give rise to an honest belief in the mind of the defendant that he was justified in what he did. Can a man be said honestly to believe, where there is no rational ground for belief?] In Rudd *v.* Scott, 2 Scott N. R. 631, in an action for imprisoning the plaintiff upon a charge of felony under the 7 & 8 G. 4, c. 29, s. 44, in pulling down part of a house and selling the materials, it was held that the defendant was within the protection of s. 75, if he bonâ fide thought he was acting in pursuance of the Act; and that the jury were properly directed to find whether or not he did so think. [ERLE, C. J.—Facts existed there which might have justified a reasonable belief on the part of the defendant that he was acting in pursuance of the Act. What we want, is, a case where bonâ fide belief has been held to bring the party within the protection, though there was no rational ground for the belief. WILLIAMS, J.—The latter cases have got over the difficulty by saying that reasonableness is an ingredient in ascertaining the existence of bona fides. But the peculiarity of this case is, that, though the jury have found bona fides, they have negatived reasonableness.] In Jones *v.* Howell, 29 Law J., Exch. 19, a female who occupied a house belonging to the defendant, saw a man on a Sunday throw a stone at the windows of the house. She immediately pointed out to the defendant two men running away, saying it was one of them, *402] *"the one with the stick," and telling him to arrest them. He did so, and one of them, the plaintiff, was proved to be the one who had thrown the stone. The jury having found bona fides, it was held that there was reasonable ground for giving him into custody, and that the defendant was entitled to notice of action. [ERLE, C. J.—The proper way of leaving the question to the jury in these cases would seem to be this,—Did the defendant honestly believe in the existence of those facts which if they did exist would afford a justification under the statute?] Here, it is submitted, the defendant could not have acted bonâ fide, unless he reasonably believed that all the facts existed which justified him in doing as he did. [ERLE, C. J.—It seems clear that the coin the plaintiff gave the defendant was a shilling.] The jury have not so found. [BYLES, J.—I could not take upon myself on the evidence to say whether it was a shilling or a florin. WILLIAMS, J.—The jury *must* have found that it was a shilling.] That question was not left to them. [BYLES, J.—The jury found that the defendant unreasonably believed that the plaintiff had passed to him a counterfeit florin.]

ERLE, C. J.—In this case the plaintiff went into the defendant's shop to buy a cigar, and, according to the defendant's account, gave him in payment a counterfeit florin, receiving 1*s.* 10*d.* change, whereupon the defendant caused him to be apprehended and taken before a magistrate, who after investigation dismissed the charge. Under these circumstances, I think the governing question for the jury was, whether the defendant really believed that the facts existed which would bring the case within the statute 24 & 25 Vict. c. 99, and honestly intended to put the law in force; and that, if the jury found

that the defendant did so *really believe, and did so honestly intend, then the defendant was entitled to a verdict, he being entitled to a notice of action, which had not been given. Whether the defendant had reasonable ground for that belief was, I think, a question subordinate to the governing question,—very material for the consideration of the jury, and very material for the consideration of the Court after the finding of the jury upon the main question. That being so, and the jury having found that the defendant did really believe that the plaintiff had passed him a counterfeit coin, and did honestly intend to put the law in force against him,—which I take to be the meaning of the finding that the defendant acted bonâ fide,—and, as I am clearly of opinion that the facts were sufficient to justify that conclusion, I do not think the other part of the finding, viz. that the defendant had no reasonable ground for such his belief, entitles the plaintiff to retain the verdict. [*403

WILLIAMS, J.—I am of the same opinion. I think the defendant was entitled to a notice of action, if he honestly intended to put the law in motion, and really believed in the existence of a state of facts which if they existed would have justified him in doing as he did. The question is whether the jury have found those facts. The difficulty arises from the uncertainty of the finding. Now, inasmuch as it is impossible that the defendant could have acted bonâ fide unless he really believed that the plaintiff had been guilty of passing a counterfeit florin, it necessarily follows from the finding of the jury that they were of opinion that he must have believed in the existence of a state of facts which if they had existed would justify him in taking the step he did. If so, the second finding of the jury is nothing more than an expression of *their opinion that he ought not as a reasonable man to have believed as he did. I think that is an opinion which they ought not to have entertained. If the defendant bonâ fide believed that the plaintiff was guilty of the offence, the case falls within the principle of Booth *v.* Clive, 10 C. B. 827 (E. C. L. R. vol. 70), and the reasonableness of his belief as an independent question would be immaterial, though it might be taken into consideration in conjunction with the other facts of the case in determining whether or not the defendant did bonâ fide believe in the plaintiff's guilt. Whether he judged reasonably or not, if he acted bonâ fide, the defendant was entitled to notice of action. [*404

The rest of the court concurring,

Rule absolute.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term,

IN THE

TWENTY-SIXTH YEAR OF THE REIGN OF VICTORIA. 1863.

The Judges who usually sat in banco in this term, were,—

ERLE, C. J., WILLES, J.,
WILLIAMS, J., KEATING, J.

REGULA GENERALIS.

Affidavits on Acknowledgments.

WITH respect to acknowledgments of deeds by married women taken in any colony or foreign possession being part of the dominions of Her Majesty,—

It is ordered that affidavits verifying the same made before any Court or Judge, magistrate, commissioner, notary public, or other person authorized to administer an oath, and containing in the jurat a statement by such Court or Judge, magistrate, commissioner, notary public, or other person, of the name or title of the office or authority which he or they *respectively hold and execute, shall be received as a sufficient compliance with the requirements of the 3 & 4 W. 4, c. 74, s. 85, relating to affidavits of verification.

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Jan. 13, 1863. By the Court.

CAWTHORNE *v.* CORDREY. *Jan.* 14.

A contract of hiring made on the 24th of March, for a year's service, to commence on the 25th, is not void by the 4th section of the Statute of Frauds, for want of a memorandum.

THIS was an action for the wrongful dismissal of the plaintiff. The cause was tried before Willes, J., at the sittings in London in the last Michaelmas Term, when it appeared, that, on Sunday the 23d of March, 1861, the plaintiff and defendant met at the defendant's house, when it was proposed that the plaintiff should enter into the defendant's service as book-keeper at a salary of 100*l.* a year, to commence on the Monday, 20*l.* to be paid him on account, the plaintiff to be occupied ten hours a day for three days in each week; that, on the Monday, the plaintiff received a check for 20*l.*, and gave the defendant a receipt, as follows,—"Received this 24th of March, 1861, of Mr. Cordrey the sum of 20*l.* on account of salary for keeping books from Lady Day for twelve months."

On the part of the defendant it was objected that the contract, not being to be performed within a year from the making thereof, and not being in writing, was void by the 4th section of the Statute of Frauds.

For the plaintiff it was submitted that the contract was not made until the Monday, and consequently it was for one year only.

The learned Judge ruled, that, assuming the contract to have been made on the Sunday, to commence on the Monday, it was not defeated by the Statute of Frauds; *but that, notwithstanding the receipt spoke of the service commencing on the 25th, there was [*407 evidence from which the jury were at liberty to infer that what passed on the Monday was a renewal of the contract made on the Sunday; and consequently the service was to be performed within the year.

The jury found that there was a contract made on the Monday for a year's service from Tuesday, the 25th; and they accordingly returned a verdict for the plaintiff, damages 60*l.*

Huddleston, Q. C., in Michaelmas Term last, obtained a rule for a new trial, on the ground that the learned Judge misdirected the jury in telling them that the contract made on the 23d, to begin on the 24th, was not within the Statute of Frauds, and that the finding of the jury of a new contract on the 24th was against the evidence. He referred to Bracegirdle *v.* Heald, 1 B. & Ald. 722, and Snelling *v.* Lord Huntingfield, 1 C. M. & R. 20,† 4 Tyrwh. 606.

Parry, Serjt., now showed cause.—The cases referred to are wholly inapplicable. There was abundant evidence to warrant the jury in inferring that the contract was made on the Monday, the 24th. A year from that day would according to the ordinary rules of computation expire on Lady Day in the following year. [WILLES, J.—If a builder undertakes to build a house within a year, that means a year from the next day. BYLES, J.—If you adopt the reasonable rule which excludes fractions of a day, taking the receipt to define the duration of the contract, there would be only three hundred and sixty-five days.]

Huddleston, Q. C., and *Lucius Kelly*, in support of the rule.—The evidence showed a complete and perfect *hiring on Sunday, the [*408 23d, to serve for one year from the 24th, and that, by the lan-

guage of the 4th section of the Statute of Frauds, must be in writing. [ERLE, C. J.—We are all agreed upon the first point. The jury have found, and, as we think, upon sufficient evidence, that there was a substituted contract on the Monday.] Then, a contract on the 24th, to serve for twelve months from the 25th, is within the statute. In Bracegirdle *v.* Heald, 1 B. & Ald. 722, it was held that a contract for a year's service, to commence at a subsequent day, being a contract not to be performed within the year, is within the 4th section of the statute, and must be in writing. "This case," said Lord Ellenborough, "falls expressly within the authority of Boydell *v.* Drummond, 11 East 142, and, if we were to hold that a case which extended one minute beyond the time pointed out by the statute, did not fall within its prohibition, I do not see where we should stop; for, in point of reason, an excess of twenty years will equally not be within the Act. Such difficulties rather turn upon the policy than upon the construction of the statute. If a party does not reduce his contract into writing, he runs the risk of its not being valid in law; for, the legislature has declared in clear and intelligible terms that every agreement that is not to be performed within the space of one year from the making thereof shall be in writing." In Snelling *v.* Lord Huntingfield, 1 C. M. & R. 20,† 4 Tyrwh. 606, A., on the 20th of July, made proposals in writing (unsigned) to B., to enter his service as bailiff for a year: B. took the proposals and went away, and entered into A.'s service on the 24th of July: and it was held that this was a contract on the 20th, not to be performed within the space of one year from the making, and within the 4th section of the Statute of Frauds

*409] Lord Lyndhurst, C. B., there *says: "The plaintiff apparently assents to the proposals made on the 20th, takes the writing with him, and enters into the service of the defendant on the 24th. Then, if there was a contract in fact upon the 20th, although by the Statute of Frauds no action can be brought upon it, how can another contract be implied? It is not like the case of a demand for services rendered; it is a claim for damages against the defendant for not continuing the plaintiff for the year, and a contract of hiring for a year must be proved."

ERLE, C. J.—There clearly was evidence upon which the jury were at liberty to find that there was a contract on the Monday, the 24th, for a year's service; and it is no objection that the receipt which the plaintiff gave for the 20*l.* advanced describes the contract as being for service from Lady Day to Lady Day.

The rest of the Court concurring, Rule discharged.

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*410] *SCHRODER, Appellant; WARD, Respondent. *Jan.* 21.

A. contracted to hire a barge of B., the contract containing a stipulation that "fair wear and tear were to be allowed by the owner," and that, when delivered up, the barge was "to be in good working order, with all her rigging, gear, and implements complete:"—Held, a misdirection, to tell the jury that this was an absolute engagement on the part of the hirer to deliver up the barge (which was proved to have been an old one at the time of hiring) in "good working order," without reference to her condition at the commencement of the hiring.

Costs on appeals from the County Courts (for Sheriff's Court, London), are in this Court always awarded to the successful party, unless there be something very exceptional in the circumstances.

THE plaintiff in this action sought to recover 40*l.* for damages accruing from the breach of the defendant's contract for the hire of a barge let to him by the plaintiff, and alleged to have been negligently and improperly used, and not delivered up in fit condition, and for the cost of restoring and repairing the barge, with the appurtenances, and for goods sold and delivered, and money found due upon accounts stated. The defendant paid 8*l.* 12*s.* into Court.

2. The action came on to be tried at the Sheriff's Court, London, on the 31st of October, 1862, when the jury returned a verdict for the plaintiff for the full amount claimed by him.

3. The contract for the hire of the barge was made by a written agreement, duly stamped, and was as follows:—

"Ward's Wharf, Blackfairs, 7th March, 1862.

"I hereby agree to take Mr. Ward's sailing barge Dede on hire, at 30*s.* per week, payable monthly, and one week's notice to be given by either party, such notice to date from the day the notice is given: hire commencing 10th March, 1862. The barge Dede, with rigging, gear, &c., to be at Mr. Schroder's risk, and he to be responsible for all loss and damage to the said barge: fair wear and tear to be allowed by the owner; and, when given up, to be in good working order, with all her rigging, gear, and implements complete.

"Inventory. 1 hitcher, 1 cork fender, 1 spanner, 2 windlass handles, 1 cabin stove, 1 cabin ladder, anchor and chain and 1 kedge anchor, 1 pair barge oars, 1 water-cask, 3 sets pump-gear, 1 gib, 1 bucket, 1 glass *skylight, steering-lines, 2 rowing chocks and 4 tacks, 1 riding lantern, 2 new side-lanterns, 2 setting booms, [*411 11 battens, 3 tarpaulings, vane board and fly, bowsprit and gear, mizen and gear, boat and two paddles, 2 stack-irons, 2 warps, 1 warp about four fathoms, 2 padlocks and keys, and 1 warp about forty fathoms.

"F. H. SCHRODER."

4. It was proved, on behalf of the plaintiff, that the said sailing-barge Dede was in good working order, with all her rigging, gear, and implements complete, when let to the defendant, but it was admitted throughout the case that it was a rather old barge; and the plaintiff's counsel only claimed such an amount of damages as was requisite to repair it and complete its rigging, gear, and implements, as such.

5. It was proved, for the plaintiff, and admitted for the defendant, that, when the barge was given up by the defendant to the plaintiff, she was not in good working order, with all her rigging, gear, and implements complete.

6. The plaintiff's evidence also went to show that the barge had been used for the purposes for which such a barge is not ordinarily or properly used; such as that she had been heavily laden with ballast, which is usually carried in dummy barges; and that, in several respects, she was, when given up, damaged in such a way as could only have been done by unreasonably heavy loads or considerable violence.

7. It was contended by the defendant's counsel that the barge was not in good order when hired; and that the purposes for which the defendant had used the barge were not unreasonable: and he stated that he should call evidence to show that she was not in good order

when hired, and that the lading of the barge had not been unreasonably heavy, and that she had not been unfairly used.

*412] *8. The learned Judge told the defendant's counsel that he should direct the jury, that, by the contract, the defendant was bound to give up the barge *in good working order*, with all her rigging, and gear, implements complete; and that, as it was admitted this had not been done, the question for the jury would be, what was the amount requisite to put the barge, rigging, gear, and implements into those states.

9. The defendant's counsel contended that the last condition of the agreement, "and, when given up, to be in good working order, with all her rigging, gear, and implements complete," was subject to the condition which precedes it, that the defendant was to be allowed by the plaintiff "fair wear and tear;" and that the question for the jury should be, whether there was more damage and loss than might have accrued from fair wear and tear. But, in consequence of the expression of the opinion of the learned Judge, he only called evidence as to the value of the deficient rigging, gear, and implements; and also called the defendant, who alleged that the barge was not in perfect repair when he hired her; but he admitted that he had examined her twice before signing the agreement.

10. The learned Judge directed the jury as mentioned above in paragraph 8.(a)

The question for the opinion of the Court was, whether the learned Judge was right in point of law in his construction of the agreement and direction to the jury, or whether he should have directed the jury as contended for by the defendant; and, if the latter, whether there should be a new trial.

*413] **Meadows*, for the appellant.—The question turns upon the construction of the agreement between the parties,—whether the engagement that the barge when given up shall be "in good working order, with all her rigging, gear, and implements complete," is not to be qualified by the words which precede, "fair wear and tear to be allowed by the owner." It is submitted that the hirer's engagement was performed if he gave up the barge in a *relatively* good condition; otherwise, the whole contract is insensible; for, it is impossible to suppose that the parties could have contemplated that an old barge should be restored in *perfect* working order. [ERLE, C. J.—The hirer was, you say, to give it up in good working order for an old barge, fair wear and tear only excepted.] Precisely so. The learned Judge ruled that the contract required the higher to restore the barge *at all events* in good repair.

Tayler, for the respondent.—The jury have found that the barge was not given up in good working order. The defendant, therefore, has failed to perform his contract. If he has made a bad bargain, the Court can only interpret it; they cannot alter its terms, which, it is submitted, they would be doing, by giving effect to the contention on the part of the appellant.

ERLE, C. J.—We are all agreed that the words "good working order" must be construed relatively,—good with reference to the pur-

(a) It is but fair to the learned Judge to say that the case was agreed upon by the attorneys for the respective parties, and that he repudiated the above statement of his ruling.

poses which a barge of such an age and condition was capable of being used for,—the same sort of order it was in when the hiring took place, fair wear and tear excepted. It would have been better if the learned Judge of the Sheriff's Court had received the evidence which Mr. *Meadows* proposed to offer. There must be a new trial.

WILLES, J.—I am of the same opinion. The words *are not to be construed in the strict sense contended for by Mr. *Tayler*, [*414 viz., that the barge was to be delivered up absolutely in good working order, but in good working order regard being had to the thing the parties were contracting about. If the barge was damaged by overloading, or anything of that sort, the case would be different.

The rest of the Court concurring,

Judgment for the appellant.

Meadows asked for costs for the appellant.

Tayler.—The Court of Exchequer has recently laid it down in Gee, app., The Lancashire and Yorkshire Railway Company, resp., 6 Hurlst. & N. 211,† that they will be governed in these cases by the practice in the superior Courts, which is, not to allow costs for the miscarriage of the Judge.

ERLE, C. J.—The almost universal rule in this Court has been to make the costs follow the event, that is, to give costs to the successful party. We will, however, take time to consider and look into the cases. *Cur. adv. vult.*

WILLES, C. J., now said:—In this case we consider the objection taken to the summing up of the learned Judge to be well founded, and that the verdict given upon the exclusion of the evidence which was offered should be set aside, and a new trial had. Mr. *Tayler* pressed on us a decision of the Court of Exchequer, where that Court refused to give costs on the reversal of a verdict in the County Court on the ground of misdirection, holding that the same rule should prevail as in similar cases in the superior Courts. That, however, is inconsistent with the rule which has long *prevailed in this Court: and, upon consideration, we feel [*415 bound to adhere to our own practice, which we find also to have been the practice upon appeals to the Privy Council. We do not think there is any analogy between the case of a new trial in the superior Courts and that of a remedy given by statute. In the case of a bill of exceptions, no costs were given on a reversal of the verdict by reason of the misdirection of the Judge: and, when the Courts substituted the motion for a new trial on the ground of misdirection for the more tedious course of a bill of exceptions, they thought, by analogy to the practice on bills of exceptions, they were bound not to grant costs on the reversal of a verdict for misdirection, upon motion. That, however, is not the condition of these appeals under the County Courts Acts. The costs are by the 14th section of the 13 & 14 Vict. c. 61, placed at the discretion of the Court; and it was very early laid down as a general and almost inflexible rule that the successful party on the appeal should have the costs: were it otherwise, a successful appeal would in most cases be worse than useless. In Foster, app., Smith, resp., 18 C. B. 161 (E. C. L. R. vol. 86), where the decision of the County Court Judge was reversed, and a new trial ordered, the Court unanimously held that the appellant was entitled

to costs. It was urgued there by Mr. Collier that the respondent ought not to be visited with costs for the misdirection of the Judge; and, further, that the decision was not *reversed*, but that all the Court did, was, to order a new trial. Jervis, C. J., however said: "In Gibbons, app., Gibbons, resp., 13 C. B. 205, 219, after time taken to consider, and after conferring with my Brother Parke, we laid it down as an universal rule, to give costs to the successful party; and there a new trial was directed. And in a subsequent case of Liedemann,
*416] app., Schultz, resp., *14 C. B. 38, 52, we acted upon the same principle, notwithstanding our attention was called to a case of Mountney *v.* Collier, 2 Ellis & B. 100 (E. C. L. R. vol. 75), where the Court of Queen's Bench had acted differently. I think it is expedient that this rule should be adhered to.(*a*) And I think it quite reasonable that the appellant, who is obliged to come here, should get his costs, if successful." That has been acted upon in very many cases since. In Robinson *v.* Lord Vernon, 7 C. B. N. S. 231, 235 (E. C. L. R. vol. 97), this Court twice granted a new trial for misdirection, and each time with costs, saying that "otherwise the redress given by the appeal would be fruitless." The like was held upon an appeal from the Wolverhampton County Court,—Weaver, app., Joule, resp., 3 C. B. N. S. 309; and upon an appeal from the Rochester County Court in Gray, app., Bompas, resp., 11 C. B. N. S. 520 (E. C. L. R. vol. 103). In the case of The London and North Western Railway Company, app., Grace, resp., 2 C. B. N. S. 555 (E. C. L. R. vol. 89), costs were not allowed: but that was because the circumstances were very peculiar. On the first occasion, the case was stated in so confused and unintelligible a manner that the Court were unable to discover whether or not the Judge meant to present a question of law for their decision; and, upon the case coming back, it was found to be so amended as to show clearly that it involved no question of law. Under these circumstances, the Court thought it unreasonable that the appellant should have costs, the Judge "having deprived the defendants of the right of appeal, by placing his decision upon the fact." Not only do we thus find it to be the almost universal rule of this Court to allow the costs of the appeal to the successful party; but we find that a similar rule prevails in the Privy Council.
*417] By an order in council *dated the 13th of June, 1853, given in the appendix to the 7th volume of Moore's Privy Council Cases, p. ix. it is ordered, "That, any former usage or practice of Her Majesty's Privy Council notwithstanding, an appellant who shall succeed in obtaining a reversal or material alteration of any judgment, decree, or order appealed from, shall be entitled to recover the costs of the appeal from the respondent, except in cases in which the lords of the judicial committee may think fit otherwise to direct." Valentine, app., Cleugh, resp., 8 Moore's P. C. 167, is a remarkable instance of the application of the rule. There, the judgment of the Admiralty Court was reversed, and the costs allowed, not only of the proceedings in the Court below, but also of those in the Court of appeal; the judicial committee saying that "the unsuccessful party must take the consequences of bringing an action which he cannot sustain." It is unnecessary to refer to subsequent cases where the Privy Council have

(*a*) And see Alcock *v.* Delay, 4 Ellis & B. 660 (E. C. L. R. vol. 82).

given costs. The instances are very numerous where this rule has been acted upon.(a) We see nothing in the circumstances of the present case to take it out of the rule. We reverse the decision with costs. And we lay it down as a general rule that the costs of appeal will always be allowed, unless there are special circumstances: and those special circumstances must be substantial.

Decision reversed, with costs.

(a) See Le Feuvre v. Sullivan, 10 Moore's P. C. 1; Frixione v. Tagliaferro, Ib. 175; Prinsep and The East India Company v. Dyce Sombre, Ib. 232; Dimes v. Dimes, Ib. 422; Dyke v. Barton, Ib. 458.

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*GEORGE SMITH, Appellant; ANNE SMITH, Respondent. *Jan.* 21. [*418

A. died, leaving a will which contained a bequest of 60*l.* to B. The will (which was assumed to be invalid) being in the hands of B., and C., the heir at law, being desirous of obtaining possession of it, it was agreed between them, that, upon C. giving a promissory note for 60*l.* payable on demand to B., the will should be deposited (together with the note) with one O., to be delivered up to C. on his paying the 60*l.* Subsequently, a meeting of all the parties interested in the property took place, and C. induced B. to procure the will from O. for the inspection of his (B.'s) attorney; which she did; and at this meeting a general settlement took place upon the footing that the will was not a valid instrument, nothing being then said about the promissory note. The will, however, remained in the hands of C.'s attorney:—Held, that there was a sufficient consideration for the note, and that B. might maintain an action upon it, although it had never been actually delivered to B. with C.'s authority.

THIS action was brought to recover the sum of 50*l.* The following are the particulars of the plaintiff's demand:—

"This action is brought to recover the sum of 50*l.* upon a promissory note of which the following is a copy:—

"£60 0 0. "Nether Broughton.

"On demand I promise to pay Miss Anne Smith or order the sum of sixty pounds, with interest for the same after the rate of four pounds per centum per annum from this day, for value received. Witness my hand this 4th day of October, 1861. "GEO. SMITH."

"Witness, W. Wright.

"(Plaintiff abandoning the excess.)"

Judgment for want of appearance was given for the plaintiff; but leave was afterwards given to defend, upon the affidavit of the defendant, of which the following is a copy:—

"In the County Court of Leicestershire holden at Melton Mowbray. [Title of the cause.]

"I, George Smith, of Nether Broughton, in the county of Leicester, carrier, the above-named defendant, make oath and say,—

"1. That this action is brought to recover the sum of fifty pounds upon a promissory note for sixty pounds given by me to the plaintiff on the 4th of October, 1861.

*"2. That such promissory note was given without any consideration, and to be enforced only upon the condition that I [*419 removed from the custody of Mr. F. J. Oldham, of Melton Mowbray, solicitor, a certain paper-writing purporting to be the last will and testament of Thomas Smith, my late father, and father also of the plaintiff.

"3. That I never did remove the said paper-writing from the custody of the said Mr. F. J. Oldham.

"4. That a memorandum was drawn up by the said Mr. F. J. Oldham or his clerk at the time I signed the said promissory note, to the effect, as before stated, that such promissory note was only to be enforced in case I removed the said paper-writing from the custody of the said Mr. F. J. Oldham.

"5. That I had no copy of such said memorandum, and which said memorandum I am informed, and I believe such information to be true, was taken away by the plaintiff from the said Mr. F. J. Oldham when the plaintiff took the said promissory note from the custody of the said Mr. F. J. Oldham.

"6. That I am advised and believe that I have a good defence on the merits both at law and in equity to this action.

"GEO. SMITH."

This case was tried on the 10th of September, 1862.

The plaintiff and defendant are sister and brother, being the children of the late Thomas Smith, of Nether Broughton, in the county of Leicester, carpenter and grazier.

The said Thomas Smith died in the year 1857, he having previously made and executed his last will and testament, of which the following is a copy:—

"June 8th, 1857.

"This is the last will and testament of me, Thomas Smith, of the
*420] parish of Nether Broughton, in the *county of Leicester, carpenter and grazier. I give and bequeath unto my wife Sarah Smith (after payment of all my just debts, funeral expenses, &c.) all my property, consisting of house, land, outbuildings, farming-stock and implements, tools and stock in trade, furniture, moneys, &c., for and during her life: After her death, I give and bequeath all the aforesaid property unto my son Henry Smith, on condition that he pay the sum of 5*l.* and the tools and chest belonging to my trade as carpenter to my son George Smith, and the sum of 60*l.* unto my daughter Anne Smith, and the sum of 30*l.* unto my daughter Harriet Scattergood, within twelve months after the death of my said wife Sarah Smith. If my said son Henry Smith shall not agree to the above-mentioned conditions, then I give and bequeath all the said property to be divided between my above-mentioned children, viz. George Smith, Anne Smith, Harriet Scattergood, and Henry Smith, viz. 5*l.* and the tools and chest belonging to my trade as carpenter to my son George Smith; then all the remainder of my property to be divided into six equal parts, my son Henry Smith to have three parts, my daughter Anne Smith to have two parts, and my daughter Harriet Scattergood to have one part. If any of my above-mentioned children should die without lawful issue before my said wife Sarah Smith, I give and bequeath his or her share to be divided equally between my remaining children. And I hereby leave my said wife Sarah Smith and my said son Henry Smith sole executors of this my last will and testament.

"THOMAS SMITH.

"In witness of "JOHN BROOKS.

"LUKE WAKELING."

From the death of the said Thomas Smith, in 1857, his widow, the

said Sarah Smith, continued in possession *of her late husband's [*421
property until the month of September, 1861, when she died without having proved the will or taken out letters of administration. The plaintiff resided with her mother down to the time of her death. After the death of the mother, the will remained in the custody of the plaintiff. Some doubts having been expressed by members of the family as to the validity of the will, the defendant applied to the plaintiff to allow him to inspect it, which she declined to do: but an arrangement was made between them that the defendant would secure to the plaintiff payment of the 60*l.* left her by the will, upon payment of which sum by him the will was to be given up to the defendant. In the mean time it was to be deposited in the hands of Mr. Oldham, of Melton Mowbray, solicitor, for the purpose of its being delivered up by him to the defendant, on payment of the 60*l.* The parties accordingly repaired to the office of Mr. Oldham, when the promissory note on which this action is brought was drawn up by his clerk and signed by the defendant; and it, together with the will, in a sealed envelope, was left in the hands of Mr. Oldham, with a memorandum, signed by both parties, of which the following is a copy:—

"Memorandum made between George Smith, of Nether Broughton, carpenter, and Anne Smith, of the same place, spinster: Whereas, the said George Smith hath this day given his promissory note, for securing to the said Anne Smith the sum of 60*l.*, and it is agreed, that, when the said George Smith shall pay off the said sum of 60*l.*, he shall receive from Mr. Oldham the parcel left with him addressed to Miss Anne Smith. Witness our hands this 4th of October, 1861.

"GEO. SMITH.
"ANNE SMITH."

*On the 12th of October, the defendant told the plaintiff that [*422
Mr. Clarke, his attorney, was expected at Nether Broughton from London, and asked her if she had any objection to obtain the will from Mr. Oldham, and show it to him, Mr. Clarke, for his inspection. She replied that she had no objection to do so; and the defendant drove her over to Melton Mowbray for that purpose. He waited outside Mr. Oldham's office while she went in and procured the will, and returned with it to Nether Broughton, where, upon Mr. Clarke's arrival on the 13th, she handed that gentleman the will in his (the defendant's) presence, for his (Mr. Clarke's) inspection. In reply to questions put to her by the defendant's attorney, she told him that her father had signed the will, but not in the presence of either of the attesting witnesses: and one of them, Luke Wakeling, being then sent for, said in the plaintiff's and defendant's presence, that, when he put his name as a witness to the will, Mr. Smith, the testator, had already signed it, and so had the witness Brooks; and that Brooks was not present when he (Wakeling) had signed it; nor did Mr. Smith, the testator, sign it in his presence. It did not appear that the plaintiff understood at that time, any more than her father had, that the defective attestation invalidated the will; and the Judge inferred that she did not, for she consented to Mr. Clarke's retaining possession of it, and he has done so ever since, the plaintiff keeping possession of the promissory note and the memorandum. The will was never n the actual corporal possession of the defendant.

Letters of administration were afterwards taken out by the defendant to the estate and effects of his late father the said Thomas Smith, and also to the estate and effects of his late mother the said Sarah Smith. Subsequently, a meeting took place, by arrangement, *at the office of Messrs. Clarke & Co., solicitors, of Nottingham, for the purpose of settling family differences, which was attended by the defendant, his brother Henry, William Scattergood, the husband of his sister Harriet, and the plaintiff. Mr. Clarke, of London, the defendant's attorney, was also present. The following document was then and there signed by the above parties:—

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"Re Thomas Smith, deceased.

"Re Sarah Smith, deceased.

"As a settlement of all disputes and differences between the undersigned, the following terms of arrangement have been this day settled and agreed upon, viz.:

"1. That the estates of both intestates be dealt with as one, and so administered:

"2. That the several articles of furniture and other effects taken up to the date hereof by the several parties are to be retained by them without account; authority being hereby given to Mr. George Smith, the administrator, to allow the same:

"3. The sum of 20*l.* held by Henry Smith to be paid over by him to Mr. John Hopkins, a creditor, and receipt produced to administrator:

"4. Possession of the farm held under the Hon. P. P. Bouverie to be taken by Henry Smith within a week after sale (including the eddish advertised for sale, which is to be withdrawn), and rent to that time to be paid out of the estate. The hay to be taken by Henry at a valuation by Messrs. Wright and Burton; and, if any difference shall exist between their valuation, such difference to be divided, except that, as to the stack of hay in the home close, half is to be sold by auction, and the proceeds to come into the estate, and the other half is to be included in valuation to Henry, who is to clear off by Lady Day. Access in *the mean time to be afforded to the close for removing and using such hay only:

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"5. Mr. Burton, the auctioneer, is to place the sale proceeds in the Leicester and Leicestershire Bank at Melton Mowbray in the joint names of himself and Mr. George Smith, the administrator: That an advertisement be inserted in local papers, by Burton, for creditors of both intestates to send in to him an account of claims: That such accounts be forwarded to Messrs. Clarke & Co. for examination and approval; and, when signed, to be returned to Burton to be paid on joint check of himself and George Smith:

"6. When all paid, balance to be equally divided between George Smith, Henry Smith, Harriet Scattergood, and Anne Smith, with concurrence of Mr. Edward Clarke, solicitor, London, and Messrs. Clarke & Co., solicitors, Nottingham. The real estate to be retained by George Smith as heir at law.

"GEORGE SMITH.
"HENRY SMITH.
"WILLIAM SCATTERGOOD.
"14 Nov., 1861. "ANNE SMITH."

Neither when this meeting took place and the foregoing document was signed, nor at any time previously, was anything whatever said, either by the defendant or his attorney or by any of the parties, about the promissory note: and the Judge was of opinion that there was no understanding at that time between the plaintiff and defendant that the said note formed any part of the matters in difference to be settled by the said agreement; but that, on the contrary, one of the inducements to the plaintiff to sign the said document was her belief that the amount of her father's intended bounty to her under his will was secured to her by the said note; and it was therefore a matter of indifference to her which of her two brothers should possess *the farm on the one hand or the freehold on the other. The defendant estimated the latter at 300*l.*; but it had been subject to a mortgage of 200*l.* at the time of his father's death. [*425

At the commencement of the trial the plaintiff's attorney put in the promissory note, with the affidavit filed by the defendant (above set forth), in proof of his having made the said note.

For the defendant, it was objected that the note was not admissible in evidence without further proof in support of it.

The Judge held that the defendant's affidavit furnished sufficient proof of the defendant's having made the note: and the case proceeded.

The defendant's attorney then adduced evidence on the part of the defendant on which the Judge found the foregoing facts: and he contended that the terms on which the note had been given, as contained in the memorandum of the 4th October, had not been complied with, because the will had not been given up by the plaintiff to the defendant, and that therefore the consideration for which the note was given failed.

The Judge was of opinion, that, by the terms of the memorandum, the payment of the 60*l.* was made a condition precedent to the delivering up of the will; and that, at all events, the delivery of the will at the defendant's request into the hands of his attorney, with permission to him to retain possession of it, whereby the defendant was enabled to put in train and carry out without further expense or litigation an arrangement for setting the will aside and giving him possession of the real estate intended by the testator to go to his brother, was a substantial compliance with the condition on which the promissory note was given; and, the defendant having thus derived the utmost benefit he could have anticipated from the *performance of that condition, he (the Judge) considered that there was a sufficient consideration for the note to sustain the action. [*426

It was further contended for the defendant, that, the plaintiff having executed the agreement of the 14th of November, 1861, she was thereby precluded from recovering in the present action.

The Judge was of opinion, for the reasons before stated, that the plaintiff did not intend or consider the debt due to her upon the promissory note to be a matter in difference to be settled by that agreement, and that therefore it did not operate as a release or extinguishment of the said debt: and he found a verdict for the plaintiff for the sum of 50*l.*

Hayes, Serjt., for the appellant.(a)—There was no consideration for the giving of the note. All parties supposed that the will of Thomas Smith was invalid. [WILLIAMS, J.—Consistently with the statements in the case, the will may have been perfectly valid. It is not necessary that the testator should sign the will in the presence of the witnesses: it is enough if he acknowledges the signature to be his.] The law does not weigh the amount of the consideration: and it may be that the giving up the sheet of paper would have been a sufficient
*427] consideration for the making of the note: *but the note was not given for any such consideration. There were doubts as to the validity of the will, the respondent had possession of it, and refused to allow the appellant to inspect it. Ultimately, it was arranged that the document should be placed in the hands of Mr. Oldham, to be given up by him to the appellant when the note should be paid. Upon this understanding, the note and the will were placed in the hands of Mr. Oldham. Even if the will had been valid, there would have been no consideration for the note. The appellant was not executor under it; neither was there any forbearance, the note being payable on demand. Oldham was the depositee of the note, and there was no delivery so as to give the respondent a right to sue upon it: Marston *v.* Allen, 8 M. & W. 494:† and the will was not given up until long subsequently. [WILLIAMS, J.—Would not a *promise* to give up the will constitute a good consideration for the note?] It might: but there was no promise here. The arrangement was, that the will should be given up to the appellant when the note was paid. The learned Judge had erroneously assumed that the subsequent delivery up of the will was the consideration. In Nelson *v.* Serle, 4 M. & W. 795,† to a declaration in debt on a promissory note for 24*l.* dated the 3d of January, 1837, made by the defendant, payable twelve months after date to the plaintiff, the defendant pleaded that one J. W., before and at his death, was indebted to the plaintiff in 24*l.* for goods sold, which sum was due to the plaintiff at the time of the making of the promissory note in the declaration mentioned; that the plaintiff, after the death of J. W., applied to the defendant for payment; whereupon, in compliance with his request, the defendant, after the death of J. W., for and in respect of the debt so remaining due to the plaintiff as aforesaid, and for no other consideration what-
*428] ever, *made and delivered the note to the plaintiff; that J. W. died intestate; and that, at the time of the making and delivery of the note, no administration had been granted of his effects, nor was there any executor or executors of his estate, nor any person liable for the debt so remaining due to the plaintiff as aforesaid; and *that there never was any consideration for the said note except as aforesaid:* and it was held,—reversing the decision of the Court of Exchequer, Serle *v.* Waterworth, 4 M. & W. 9,†—that the plea was a good answer to the declaration. Then, that which passed with Mr. Clarke, when the memorandum of the 14th of November, 1861,

(a) The points marked for argument on the part of the appellant were as follows:—

"1. That there was no sufficient consideration for making the note or for the payment thereof, and that the appellant never removed the alleged will from the custody of Mr. Oldham, so as to make himself liable for the note:

"2. That, if there was a sufficient consideration, it wholly failed under the circumstances set forth in the case, and according to the evidence given:

"3. That the evidence given was insufficient to entitle the plaintiff to a verdict or judgment."

was executed, clearly could not constitute a consideration for the note. The note was never mentioned on that occasion.

Beasley, for the respondent, was not called upon.(*a*)

ERLE, C. J.—I think the Judge of the County Court came to a right conclusion in this case. My Brother *Hayes* has rightly abstained from saying anything as to the admissibility of the defendant's affidavit. But he has insisted that the note given by him to the plaintiff was without consideration. The circumstances appear to be these:—Thomas Smith, the father, died, leaving a will under which his property was to be divided in a certain way. Anne Smith, the plaintiff, who was to receive a legacy of 60*l.* under it, *had the [*429
will in her possession, and declined to allow George Smith, the defendant, who was the heir at law, to see it. The will being thus in the possession of Anne Smith, and doubts being entertained as to its validity, an arrangement was come to, under which the will was to be placed in the hands of Mr. Oldham, George Smith giving his promissory note payable on demand to secure to Anne Smith her legacy of 60*l.* with an understanding that the will was to be delivered up to George Smith when the 60*l.* should have been paid. I am of opinion that there was abundant consideration for the note in the performance of the agreement by Anne Smith to deposit the will with Mr. Oldham upon the terms above mentioned. Take it that the note was delivered to Mr. Oldham to be held by him until the will was given up to George Smith,—I should still be of opinion that the condition had been performed. George Smith asks to have the will for the inspection of Mr. Clarke, his attorney; and the plaintiff obtains it and hands it over to Mr. Clarke, who retains it: and all the parties interested meet and arrange for the administration of the estate upon the supposition that the will was invalid. Under these circumstances, I think the paper was in substance and effect delivered to the defendant. An attempt was made to set up something like an accord and satisfaction when the meeting took place and the memorandum of the 14th of November was drawn up. But at that time the note was in the hands of the plaintiff, and nothing was said about it. I see nothing in the arrangement which then took place to impeach the right of the plaintiff to the 60*l.* The defendant has got what he bargained for.

WILLIAMS, J., concurred.

WILLES, J.—I also think that the respondent is *entitled to [*430
judgment. The case seems to me to be very like that of a contract for the sale of a patent. When the party has got the thing he bargained for, he must pay for it, though it may turn out that the patent is invalid.(*b*)

KEATING, J., concurred. Decision affirmed, with costs.

(*a*) The points which were marked for argument on the part of the respondent were as follows:—

"1. That the decision of the County Court Judge was right, and that it was not necessary for the plaintiff to give any evidence in support of her case, beyond that which was adduced:

"2. That the other matters referred to by the defendant were matters of fact wholly in the province of the Judge to decide."

(*b*) See Hall *v.* Conder, 2 C B. N. S. 22 (E. C. L. R. vol. 89), and Smith *v.* Neale, Id. 67.

COX v. BURBRIDGE. *Jan.* 14.

The defendant's horse, being on a highway, kicked the plaintiff, a child who was playing there. There was no evidence to show how the horse came on the spot, or what induced him to kick the child, or that he was accustomed to kick:—Held, no evidence from which a jury would be justified in inferring that the defendant had been guilty of actionable negligence.

THIS was an action for negligence. The plaintiff, an infant, sued by his next friend. The declaration stated that the defendant was possessed of a horse, and that he took so little and such bad care of the said horse, and so carelessly, negligently, and improperly kept the same, that, by and through the mere carelessness, negligence, and wrongful and improper conduct of the defendant in that behalf, the said horse kicked the plaintiff, then lawfully being on a certain highway, and by means of the premises the plaintiff became and was and is greatly and permanently injured, &c. Plea, not guilty.

The cause was tried before Willes, J., at the last sitting at Westminster in Michaelmas Term last. The facts which appeared in evidence were as follows:—On the 11th of June, 1861, a horse belonging to the defendant was grazing on a newly-made road which led to some houses, and which had for some time been used as a road, but not adopted by the parish. The *plaintiff, a little boy about five years of age, was playing in the road, when the horse, which was on the foot-path, struck out and kicked him in the face, injuring him very severely. There was no evidence to show how the horse got to the spot, or that the defendant knew he was there, or that the animal was at all vicious, or that the child had done anything to irritate it.

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Under these circumstances, it was submitted on the part of the defendant that there was no case to go to the jury. The learned Judge, however, did not like to withdraw the case; but he reserved the question of liability: and the jury returned a verdict for the plaintiff for 20*l.*

Shaw, in Michaelmas Term last, accordingly obtained a rule nisi to enter a nonsuit.

V. Williams now showed cause.—The fact of the horse being loose on a highway (where he could not lawfully be,—6 & 7 W. 4, c. 50, s. 74) unattended, is primâ facie evidence of negligence and want of proper care on the part of his owner. The horse was wrongfully where he was: it was a common nuisance, unless he was there using the road for passage: whereas, the child was lawfully there. This was enough to call upon the defendant for an answer. [WILLES, J.—Suppose I have a dog, and he is out on the street, and there bites a child who pulls his tail or his ear,—am I liable to an action, without more?] In Mason *v.* Keeling, 1 Ld. Raym. 606, Holt, C. J., and Turton, J., say: "There is a great difference between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs: the former the owner ought to confine, and take all reasonable caution that they do no mischief, otherwise an *action will lie against him: but otherwise of dogs, before he has notice of some mischievous quality." In Illidge *v.* Goodwin, 5 C. & P. 190 (E. C. L. R. vol. 24), it was held, that, if a horse and cart are left standing in the street, without any person to watch them,

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the owner is liable for any damage done by them, though it be occasioned by the act of a passer by, in striking the horse. Tindal, C. J., there says: "If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." So, here, it is submitted, the defendant having chosen to permit his horse to be upon a highway unattended, he must take the risk of any mischief that may be done by him. In Lynch *v.* Nurdin, 1 Q. B. 29 (E. C. L. R. vol. 41), 4 P. & D. 672, the defendant negligently left his horse and cart unattended in the street: the plaintiff, a child seven years old, got upon the cart in play: another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt: and it was held that the defendant was liable, though the plaintiff was a trespasser, and contributed to the mischief by his own act. Lord Denman, in giving judgment, there says: "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." In Quarman *v.* Burnett, 6 M. & W. 499,† where a coachman (not being the servant of the defendants) left his horses unattended, and they ran away and injured the plaintiff, Parke, B., in delivering the judgment of the Court, says: "The immediate cause of the injury is, the personal neglect of the coachman in leaving the horses, which were at the time in his immediate care. The question of law is, *whether any [*433 one but the coachman is liable to the party injured; for, *the coachman certainly is*." If the coachman would be liable, the owner of the horses would clearly be liable also. The judgment in May *v.* Burdett, 9 Q. B. 101 (E. C. L. R. vol. 58), also supports this view. In Hammack *v.* White, 11 C. B. N. S. 588 (E. C. L. R. vol. 103), where this subject was very much considered, Keating, J., says: "If the evidence had shown that this horse was a quiet and manageable horse, and that the deceased at the time he met with the injury which resulted in his death was walking on the foot-pavement, I must own I should have thought that there was primâ facie enough to call upon the defendant to show that he had used due care and skill, because then it would have been more consistent to assume that the accident arose from his want of care and skill."

Shaw, in support of the rule.—The animal in question not being one of a ferocious nature, the defendant can only be liable for negligence, and for such damage as may fairly be considered as the immediate consequences of his negligence: and here it is submitted there was no evidence at all of negligence which ought to have been submitted to the jury. None of the cases cited on the part of the plaintiff have any considerable bearing upon this case except Hammack *v.* White, 11 C. B. N. S. 588 (E. C. L. R. vol. 103), and that is strongly in favour of the defendant. The owner of an animal of a ferocious nature keeps it at his peril, and is responsible for any injury resulting from the absence of due restraint.(*a*) But the case of a horse is very different. The Highway Act is out of the question. If thiswas proved to be a highway, the defendant might have been liable to a penalty for allowing

(*a*) See the authorities collected in Card *v.* Case, 5 C. B. 622 (E. C. L. R. vol. 57).

*434] the horse to be there: but that is all. In Fawcett v. The *York and North Midland Railway Company, 16 Q. B. 610 (E. C. L. R. vol. 71), where in an action against a railway company for the negligence of their servants in leaving unclosed gates where the line crossed a highway on a level, whereby the plaintiff's horses got upon the line and were killed, the defendants sought to defend themselves on the ground that the horses were straying on the highway and consequently were not *lawfully* there, Coleridge, J., said: "An issue is joined on the question whether the horses were lawfully on the road. In one sense, perhaps, the horses were not lawfully there; for, it is possible that the surveyors of the highway might have seized them as being wrongfully there: but, supposing that the surveyors could do so, the issue is to be construed as meaning 'lawfully' as between these two parties, the owner of the cattle and the railway company. The railway company cannot insist on an unlawfulness as regards a third person who does not interfere." [ERLE, C. J.—The question here is, whether the owner of an animal mansuetæ naturæ is liable for an unexplained kick.] In Assop v. Yates, 2 Hurlst. & N. 768,† a declaration against a master alleged that he knowingly, carelessly, and negligently erected a hoarding in a street, and left a certain machine in a position in which it was likely to cause danger to the workmen, and that a cart accidentally ran against the hoarding and knocked down the machine against the plaintiff. It appeared that a hoarding had been erected by the defendant, a builder, which projected too far into the street; but sufficient room was left for carts to pass: a heavy machine was placed inside the hoarding, and close to it: a cart in passing struck against the hoarding, and knocked down the machine against the plaintiff, a workman employed by the defendant. The plaintiff had previously made some complaint of the position of the

*435] *machine to his master, but voluntarily continued to work, though the machine was not moved: and it was held that there was no evidence to go to the jury of the master's liability. In Cotton v. Wood, 8 C. B. N. S. 568 (E. C. L. R. vol. 98), it was held, that, in an action for negligent driving, the Judge will not be justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. Here, the facts are quite consistent with the absence of negligence on the defendant's part. And in Hammack v. White, Erle, C. J., says: "I am of opinion that the plaintiff in a case of this sort is not entitled to have his case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant." At all events, there is no sufficiently proximate connection between the alleged negligence of the defendant and the damage to the plaintiff, to render the former liable: Hoey v. Felton, 11 C. B. N. S. 142 (E. C. L. R. vol. 103).

ERLE, C. J.—I am of opinion that this rule must be made absolute, on the ground that there was a total absence of evidence to support the cause of action alleged. The facts I take to be these,—The plaintiff, a child of tender age, was lawfully upon the highway, and a horse, the property of the defendant, was straying on the highway. As between the owner of the horse and the owner of the soil of the highway or of the herbage growing thereon, we may assume that the

horse was trespassing: and, if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. So, it may be assumed, that, if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Act. But, in considering the claim of the plaintiff *against the defendant for the injury sustained from the kick, the question whether the horse was a [*436
trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff. I am also of opinion that so much of the argument which has been addressed to us on the part of the plaintiff as assumes the action to be founded upon the negligence of the owner of the horse in allowing it to be upon the road unattended, is not tenable. To entitle the plaintiff to maintain the action, it is necessary to show a breach of some legal duty due from the defendant to the plaintiff; and it is enough to say that there is no evidence to support the affirmative of the issue that there was negligence on the part of the defendant for which an action would lie by the plaintiff. The simple fact found, is, that the horse was on the highway. He may have been there without any negligence of the owner: he might have been put there by a stranger, or might have escaped from some enclosed place without the owner's knowledge. To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. Thus, in the case of a dog, if he bites a man or worries sheep, and his owner knows that he is accustomed to bite men or to *worry [*437
sheep, the owner is responsible; but the party injured has no remedy unless the scienter can be proved. This is very familiar doctrine; and it seems to me that there is much stronger reason for applying that rule in respect of the damage done here. The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbour's corn or pasture. For a trespass of that kind, the owner is of course responsible. But, if the horse does something which is quite contrary to his ordinary nature, something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has: and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway. I think the ground upon which the plaintiff's counsel rests his case fails. It reduces itself to the question whether the owner of a horse is liable for a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the horse, without more. The cases to be found in the books upon this subject are very numerous. It is not necessary to go through them. But I take the decision of the Court of Exchequer in Hudson *v.* Roberts, 6 Exch. 697,† to warrant me in the distinction I

suggest. There, a bull passing along a highway, seeing the plaintiff with a red handkerchief, ran at and gored him: and the decision turned on the question whether or not the owner of the bull knew that he had a tendency to run at any person wearing red. As the Court rested its judgment on the scienter, it stands to reason, that, if there had been no scienter, they would have held the owner not to be liable. The case of the ram,—Jackson v. Smithson, 15 M. & W. 563,†—is also a much stronger case in favour of the defendant. Animals of that description are known to be mischievous at certain seasons; and *yet, where a ram butted and injured the plaintiff's wife in the street, the Court of Exchequer held that the owner of the animal was not liable to an action in the absence of evidence that he was aware of its propensity to attack passers by. In these cases it seems to me that the tendency to mischief is very much more probable than that a horse on a highway will kick out without anything to account for it; and I do not see why a different rule should be applied to a horse than that which obtains with regard to the other animals I have mentioned. For these reasons, it seems to me that the plaintiff has failed to establish a cause of action against the defendant.

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WILLIAMS, J.—I am entirely of the same opinion. Much has been said as to whether or not there was any evidence of negligence on the part of the defendant: but it seems to me that that is not the governing point of the case. I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence, is altogether immaterial. I am clearly liable for the trespass, and for all the ordinary consequences of the trespass, subject to a distinction which is taken very early in the books, that the animal is such that the owner of it may have a property in it which is recognisable by law.(a) For instance, if a man's cattle, or sheep, or poultry, stray into his neighbour's land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his *neighbour for the consequences. The question, then, is, whether the injury which is the subject of this action falls within that rule. Upon the result of the authorities, I am of opinion that it does not. We must assume that the injury to the plaintiff was caused by the horse having viciously kicked him, as a horse of ordinary temper would not have done. Taking that to be so, I am of opinion that the plaintiff cannot maintain the action because he has not shown that the defendant knew that the horse was subject to that infirmity of temper. That brings the case within the ordinary rule by which it is established that the owner is not liable unless it can be shown that he was aware of the irritable temper and vice of the animal. There is no trace to be found in the books of an owner being held liable beyond the consequences of ordinary tres-

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(a) See May v. Burdett, 9 Q. B. 101 (E. C. L. R. vol. 58), where much of this early doctrine is gone into.

passes, in the absence of such evidence as I have above pointed out: and I think we ought not to introduce a new ground of action.

WILLES, J.—I am of the same opinion. The distinction is clear between animals of a fierce nature, and animals of a mild nature which do not ordinarily do mischief like that in question. As to the former, if a man chooses to keep them, he must take care to keep them under proper control, and, if he fails to do so, he is taken to know their propensities, and is held answerable for any damage that may be done by them before they escape from him and return to their natural state of liberty. As to animals which are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal nature done by them, unless they are shown to have acquired some vicious or mischievous habit or propensity, and the owner is shown to have been aware of the fact. If the animal has such vicious propensity, and the owner knows of it, he is bound to take such care as he would of an *animal which is feræ naturæ, because it [*440 forms an exception to its class. In some of the books I find expressions falling from Judges which I am at a loss to appreciate. Holt, C. J., says in Mason v. Keeling, 1 Lord Raym. 608, that there is a "great difference between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs: the former the owner ought to confine, and take all reasonable caution that they do no mischief, otherwise an action will lie against him; but otherwise of dogs, before he has notice of some mischievous quality." I cannot see what difference it can make whether the animal is or is not one in which a man may have a valuable property. I cannot help thinking that that expression has reference to what is found in the Institutes, Book 4, tit. 9, "Si ursus fugerit à domino, et sic nocuerit, non potest quondam dominus conveniri, quia desiit dominus esse, ubi fera evasit." I do not think that can well apply to dogs, after the astonishment expressed by the Court in M. 20 E. 4, fo. 11, at a plea which spoke of dogs as "wild," and the case in the Year Book, T. 12 H. 8, fo. 3, a, where an action lay for taking away a blood-hound. It clearly established that a property may be acquired in animals which are tame, although such animals might not have been titheable. Some curious reasons are given in that case in H. 8th's time why dogs are not the subject of larceny; but unquestionably they have effect at the present day.(a) I can quite understand the expression used by Lord Holt as applied to control. I can quite understand a distinction being drawn between animals which from their natural tendency to stray, and thereby to do real damage, require to be and usually are restrained, and a dog, which is not usually kept confined: and there may be good reason besides "de minimis non *curat lex" why an action should not lie against a man whose [*441 dog without the will of its master enters another's land, though it is different in the case of a horse or an ox. Perhaps control was meant by Lord Holt, and not property. His dictum exhausts itself on the liability of the owners of horses and oxen for trespasses committed by them on land, pursuing their ordinary instincts in search of food. Whatever doubt, however, may be raised by the use of that expression, cannot affect the present case, because Lord Holt goes on

(a) See Regina v. Robinson, Bell C. C. 34.

to put this very case of a horse as one where the owner is not liable unless he knows of the vice. The important circumstance in this case is, that the act was not in accordance with the ordinary instinct of the animal, which was not shown to be of a mischievous disposition. Does, then, the fact of the horse being on the highway make any difference? No doubt, if the horse was trespassing there, the owner of the highway might have an action against the owner of the horse. So, possibly, the owner of the horse might be liable to an indictment for obstructing the highway, or to a fine. But that was not the cause of the mischief here. It comes round, therefore, to the question, whether the owner is liable for an act of this sort done by an animal not of a naturally vicious character, and which is not found to have been accustomed to commit such mischief. I think the rule must be made absolute to enter a nonsuit.

KEATING, J.—I am entirely of the same opinion. It must be taken that the accident was not occasioned by any act of the child himself; and that the act was the act of a vicious horse. That being so, the scienter was essential. And there being no evidence of that, the rule must be absolute. Rule absolute.

*442] *ADAMS and Others *v.* MACKENZIE. *Jan.* 17.

A policy was effected on a ship "against total loss only." The ship was damaged by perils of the sea to an extent to warrant the jury in finding a constructive total loss:—Held, that there was nothing in the form of the policy to exclude the liability of the underwriters.

THIS was an action upon a policy of insurance on a ship called the Susan, "beginning the adventure at Llanelly, and continuing during her abode there and until the ship and premises should be arrived at Teignmouth or Exmouth, and until the ship should have been moored at anchor twenty-four hours in good safety, *against total loss only.*"

The declaration was in the usual form. The defendant pleaded, amongst other pleas, that the ship was not totally lost within the meaning of the policy.

The cause was tried before Williams, J., at the last Summer Assizes at Exeter, when the following facts appeared in evidence:—The Susan, which was an old ship, sailed from Llanelly for Teignmouth with a cargo of coals, on the 17th of January, 1860. She met with very tempestuous weather, and did not arrive off Teignmouth until the 5th of February. Having got over the bar with difficulty, she was being towed up the channel, when, in consequence of the crippled state she was in, and the strength of the wind and tide, she took the ground and fell over and was damaged. Notwithstanding every exertion, she could not be got off: and eventually notice of abandonment was given. It was proved that the ship, though still existing as a ship, was in such a condition that she was not worth the expense of repair: and it was hardly denied, that, if this had been an ordinary policy, the loss would have amounted to a constructive total loss; but it was contended on the part of the defendant that the

words "against total loss only" took the case out of the general rule, and that the plaintiffs were not entitled to recover upon this policy, unless there was an *actual* total loss. The ship was afterwards repaired and sold for 370*l.*

*The learned Judge told the jury that the underwriters would be liable on this policy if there was that which was commonly known as a "constructive total loss," the meaning of which he explained to them in a manner to which no exception could be taken: and he told them, that, if they thought there had been such a loss, the plaintiffs were entitled to a verdict. [*443

The jury returned a verdict for the plaintiffs: and leave was reserved to the defendant to move to enter the verdict for him, if the Court should be of opinion that the terms of the policy precluded the plaintiffs from recovering for anything short of an actual total loss.

Sir F. Slade, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly.

Macaulay, Q. C., and *Watkin Williams* showed cause.—The jury have found that there was a constructive total loss: and it is conceded, that, if this had been a policy in the ordinary form, the assured would be entitled to recover as for a total loss: 2 Arnould on Insurance, 2d edit. 1007. The definition of a total loss given by Maule, J., in Moss *v.* Smith, 9 C. B. 94, 102, has often been recognised. "If," says the learned Judge, "the ship is actually lost by a peril of the sea, or any other peril covered by the policy, the assured may call it a total loss. If she sustains damage to such an extent that she cannot be repaired at all, that also is a total loss. It may be that the injury sustained by the ship is irreparable with reference to the place where she is; for instance, the ship may have met with the disaster at a place where no workmen of requisite powers are to be met with, or where the necessary materials are not to be found, so that to repair her there is altogether impracticable: and in such a case, the loss would also be a total loss. But, *short of that, it may be that it may be physically possible to repair the ship, but at an enormous cost: and there also the loss would be total; for, in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling, when he has dropped it into deep water; though it might be possible, by some very expensive contrivance, to recover it. So, if a ship sustains such extensive damage that it would not be reasonably practicable to repair her,—seeing that the expense of repairs would be such that no man of common sense would incur the outlay,—the ship is said to be totally lost." [WILLIAMS, J.—Jervis, C. J., adopts that in Rosetto *v.* Gurney, 11 C. B. 176, 186 (E. C. L. R. vol. 73).] And it is quite in accordance with the definition of a total loss given by Lord Abinger, in delivering the judgment of the Exchequer Chamber, in Roux *v.* Salvador, 3 N. C. 266, 279 (E. C. L. R. vol. 32), 4 Scott 1, 25. "If," says his Lordship, "the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be [*444

re-shipped into the same or any other vessel; if it be certain, that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if by any circumstances over which he has no control they can never, or within no assignable period, be brought to their original destination: in any of these cases, the circumstance of their existing in specie at *that forced termination* of the risk, is of no importance. The loss is, in its nature, total to
*445] him who has no means of *recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle." Here, the insurance is expressed to be against "total loss only." That could only be construed to mean "*absolute* total loss," by reason of some custom. If this was a loss which could come within the definition of a "total loss," the jury have by their finding concluded the question. [WILLIAMS, J.—This is purely a question as to the construction of the language of the instrument.]

Montague Smith, Q. C., and *Karslake*, Q. C., showed cause.—No doubt, the repairs rendered necessary by the accident would have cost more than the worth of the ship when repaired: but that was referable to her age. The question here is, not whether, under an ordinary policy, that which has occurred would amount to a constructive total loss, so as to justify the assured in abandoning; but what is the meaning of this policy. The underwriters have,—no doubt, for sufficient reasons, seeing that to a vessel of her age a comparatively slight damage might result in total loss,—entered into a limited contract; they undertake to insure "against total loss only," evidently meaning to exclude all considerations of partial or average loss and cost of repairs. They clearly did not intend to be answerable provided the ship arrived at her port as a ship. Perhaps the matter would have been made more clear if the word "absolute" had been inserted in the policy. What amounts to a total loss, is well illustrated by the summing up of Lord Tenterden in Doyle *v.* Dallas, 1 M. & Rob. 54, and of Tindal, C. J., in Somes *v.* Sugrue, 4 C. & P. 276 (E. C. L. R. vol. 19). What was said by Maule, J., in Moss *v.* Smith, and by Jervis, C. J., in Rosetto *v.* Gurney, had reference to the ordinary form of policy. The same observation applies to the
*446] *judgment of Lord Abinger in Roux *v.* Salvador. In 2 Arnould, § 386, it is said: "It must be carefully borne in mind, that, in order to give the assured even a primâ facie right to abandon in respect of capture, seizure, desertion, or other privation of property or possession, whether forcible or not, there must have been at some one period of time during the risk a total loss *by the complete and actual privation of the owner's possession or control over the ship:* if the legal possession of the ship by the owner have never for any single point of time been put an end to by the casualty in respect of which he abandons, he has no vested right of abandonment, and can never recover as for a total loss."

ERLE, C. J.—I am of opinion that this rule must be discharged. I find a difficulty in expressing myself. The insurance is "against total loss only." The jury have found that there was a total loss: and the evidence was such as to warrant that finding. It has been

urged on the part of the underwriters that they only intended to become answerable for one of the two descriptions of "total loss," viz., the actual total destruction of the subject-matter of insurance, and not for that which all persons conversant with insurance business understand as being a total loss. All I can say is, that, if they so intended, they have failed to express their intention.

WILLIAMS, J.—I am of the same opinion. If the parties intended only to insure against the total and absolute physical destruction of the ship, they should have expressed themselves in different language.

WILLES, J.—I am entirely of the same opinion: and I desire to guard myself against being supposed to *admit that the insertion of the word "actual" or "absolute" would have made any [*447 difference. Upon that I express no opinion. The reason why an owner is allowed to abandon in certain cases, is, because there has occurred that which substantially amounts to a total loss of the subject-matter of insurance. It is considered to be inequitable to call upon him to expend upon the repair of the vessel a sum which will greatly exceed her entire value when repaired. I give no opinion as to whether anything short of the use of the words "without benefit of abandonment" would be sufficient to exclude what everybody in a Court of law agrees to amount to a total loss.

KEATING, J., concurred. Rule discharged.

JOSLING *v.* KINGSFORD. *Jan.* 28.

A contract for the sale of "oxalic acid" is not complied with by the delivery of an article which the jury find not in commercial language to come properly within the description of "oxalic acid,"—even where the seller is not the manufacturer of the article, and at the time of contracting expressly declines all responsibility as to the *quality*, and the buyer has had an opportunity of inspecting it, and no fraud is suggested.

THIS was an action brought by the plaintiff, a commission agent, against the defendant, a merchant, for the recovery of damages for not delivering certain oxalic acid according to contract.

The cause was tried before Erle, C. J., at the sittings in London after last Term. The facts which appeared in evidence were as follows:—On the 7th of August, 1860, the plaintiff, who was in the habit of receiving consignments of oxalic acid from the manufacturers, Messrs. Bailey & Smith, for sale on commission, *addressed a [*448 letter to the defendant to the following effect:—

"Dear Sirs,—We have been using our best endeavours to induce Messrs. Papineau & Co. to accept your terms for a barter contract, oxalic against sorrell. We have the following proposal,—to take oxalic at 96 °/₀₀ and upwards, delivered at their works, or cartage 4*s.* per ton, to be delivered in quantities of 2 tons each, first delivery at once, and then 1 ton 5 cwt. or 2 tons per week, at your option, against equal quantities of sorrell delivered in London at the rate of 25 cwt. per week, first delivery to be made in fourteen days, at a net difference of 2½*d.* Payment in cash upon each delivery of sorrell.

"JOSLING & Co.,
"Per H. GRAY."

"Messrs. KINGSFORD & Co."

To this letter the defendant replied as follows:—

"8th August, 1860."

"Gentlemen,—In reply to your favour of yesterday, we beg to say that we are willing to contract for 10 tons oxalic acid at 7½*d.* net, free weighed to your carts, against an equal quantity of sorrell delivered at a wharf in London at 10*d.*: two tons, more or less, at your option, to be delivered every week, one against the other: but we must decline delivering oxalic before receiving sorrell, unless paid for. In the latter case, we will pay for sorrell as delivered. *As regards the strength of the oxalic, your friend having already examined the bulk, we decline all responsibility in this respect, and to avoid any unpleasant differences.* You are, however, quite welcome to examine it again, if you think proper. "COURTENAY KINGSFORD & Co."

"Messrs. JOSLING & Co."

*449] *The plaintiff, treating this as an acceptance of his offer, shortly afterwards transmitted to the defendant the following bought-note:—

"15th August, 1860.

"Bought of Messrs. C. Kingsford & Co. 45 casks of oxalic acid @ 7½*d.* per lb. *quality approved*, marked and numbered S 4/14, 29/62: delivered, four or eight casks weekly, at buyer's option. Prompt, fourteen days from each delivery. Discount, nil.

"JOSLING & Co.

"Per H. GRAY."

The second contract was as follows:—

"14th December, 1860.

"Bought of Messrs. C. Kingsford & Co. 20 tons oxalic acid crystals, quality to be approved, at 8*d.* per lb. net, delivered to our carts, in barter for 20 tons of good merchantable sal acetosella of Papineau's make at 10½*d.* per lb., delivered free in London. The oxalic acid to be delivered one ton per week: first delivery, 31st of December next. The sorrell to be delivered one ton per week: first delivery, between 1st and 5th January, 1861. Prompt, fourteen days after each delivery. "JOSLING & Co.

"Per H. GRAY."

There were similar bought-notes with reference to the sorrell.

Before either of these contracts was made, the plaintiff's clerk, Gray, and the defendant, had had conversations about the quality of the oxalic acid, the subject of the first contract, and the samples had been examined and the bulk inspected by Gray, who considered it of good quality, and fit for the purpose for which it was intended.

*450] *The plaintiff had contracted with Papineau for the conversion of the oxalic acid into sorrell; and Papineau had also examined the acid, and found no fault with it. The defendant was not the manufacturer of the oxalic acid.

Under the first contract, about eleven tons and a half of oxalic acid were delivered by the defendant to the plaintiff against an equal quantity of sorrell delivered by the plaintiff to the defendant.

After the second contract was made, Papineau went with the defendant and inspected about twelve tons of oxalic acid which was pointed out as that intended to be delivered to the plaintiff; and no objection was made to it. The deliveries of oxalic acid by the defendant to the

plaintiff under this contract commenced on the 1st of January, 1861; and the deliveries of sorrell by the plaintiff to the defendant commenced on the 5th. In February, complaint was made by the plaintiff as to the colour of the oxalic acid: the defendant also complained of the inferiority of the sorrell. Each, however, continued to supply the article until June, when the defendant again complained of the quality of the sorrell. In the course of that month Papineau caused the oxalic acid to be analyzed, when it was found to contain a considerable admixture (averaging about 10 per cent.) of sulphate of magnesia,—Epsom salts. It appeared that the presence of sulphate of magnesia in oxalic acid cannot be detected by mere inspection. It also appeared that its presence seriously impeded the conversion of the oxalic acid into sorrell, as well as diminished the quantity. Papineau thereupon claimed compensation from the plaintiff; and the plaintiff sued the defendant upon his contracts, charging in one set of counts the non-delivery of oxalic acid in accordance with the contract, and in another set a breach of warranty,—averring *special damage. The defendant traversed the making of the contracts, the warranty, and the breach. Issue thereon. [*451

In his summing up the Lord Chief Justice told the jury that there was no evidence of any warranty: but he further told them that the defendant could only perform his part of the contracts by delivering that which in commercial language might properly be said to come under the denomination of oxalic acid; and that, if they should be of opinion that the article delivered by the defendant as oxalic acid did not properly fulfil that description, they should find for the plaintiff.

The jury thereupon returned a verdict for the plaintiff, damages 400*l.*

Lush, Q. C., now moved for a new trial, on the ground of misdirection, and misreception of evidence.—The jury should have been told, that, inasmuch as the contract was for a given number of casks of that which the parties called oxalic acid, and the buyer had opportunity for inspection, and such actual inspection as he chose to make, and the seller by the express terms of the contract declined all responsibility in respect of quality, in the absence of an express warranty, the plaintiff was not entitled to recover. Where the buyer of an article has an opportunity to inspect it, and buys upon his own judgment, not relying upon any representation on the part of the seller, no implied warranty can exist. [ERLE, C. J.—The contract is for an article which will come under the commercial denomination of oxalic acid: and the jury have found that that which the defendant supplied was not oxalic acid in the proper commercial sense.] That raises the broad question which has never yet specifically been decided, viz. whether, upon a sale of goods, where the buyer has *an opportunity of inspecting them, and buys relying upon his own judgment, any warranty can be implied either as to quality or as to the thing being that which it is represented to be. The plaintiff, it must be remembered, is not the manufacturer, but an innocent vendor; and he expressly stipulates by his contract that the article shall be approved by the plaintiff before the transaction is entered into. Wheeler *v.* Schilizzi, 17 C. B. 619 (E. C. L. R. vol. 84), is an essentially different case. There, the contract was in respect of a cargo of [*452

linseed afloat, which could not be inspected. Jervis, C. J., in submitting the case to the jury, told them that the question for them to consider, was, whether the plaintiff got what he bargained for,—whether there was such an admixture of foreign substances in it as to alter the distinctive character of the article, and prevent it from answering the description of it in the contract. That direction (which the Court afterwards approved of) had reference to a contract for an article which the buyer had no opportunity of inspecting and exercising his judgment upon; and it was no part of the contract there, as it is here, that the buyer *should* take that responsibility upon himself. [ERLE, C. J.—I left the question to the jury pretty much as it was left in that case. In substance I told them, that, if they found that the article delivered did not commercially answer the description of oxalic acid, the plaintiff had not performed his contract. WILLIAMS, J. —If it be part of the contract that the article to be delivered is oxalic acid, is it not a breach of that contract if the thing delivered is something else?] The true question is, whether the buyer bought the article he inspected, or trusted to the representation of the seller. [WILLIAMS, J.—You might be right if it was a mere contest about the *quality* of the article.] To the extent of 90 per *453] cent., at all events the substance delivered here was *what it purported to be. The way in which the rule is laid down by Lord Ellenborough in Gardner *v.* Gray, 4 Campb. 144, is this,—"This was not a sale by sample. The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity. I am of opinion, however, that, under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill." [ERLE, C. J.—There, the defect was one which might have been discovered on inspection.] In Allan *v.* Lake, 18 Q. B. 560 (E. C. L. R. vol. 83), the sale was of a particular description of seed,—"Skirving's Swedes,"—and the seed delivered was of a different sort. Erle, J., there says: "Where a vendor gives a description of the properties of an article, it is a question for the jury whether such description is a mere commendation of the article or a direct representation that he sells it as being the particular article described." In Power *v.* Barham, 4 Ad. & E. 473 (E. C. L. R. vol. 31), 6 N. & M. 63 (E. C. L. R. vol. 36), where the invoice described the articles bought as "Views in Venice, Canaletto," but the buyer had an opportunity of inspecting and passing his own judgment upon the pictures, the Court did not take upon itself to say whether this amounted to a representation that the pictures were by Canaletti, or a mere *454] description: but it was left to the jury. *[WILLIAMS, J.—They were oil-paintings, at all events.] In Jendwine *v.* Hade, 2 Esp. N. P. C. 572, where the defendant had in the catalogue of sale

described two pictures bought by the plaintiff as by Claude Loraine and by Teniers, Lord Kenyon said "It was impossible to make this the case of a warranty: the pictures were the work of artists some centuries back,(a) and, there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What, then, does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action in its present shape must go on the ground of some fraud in the sale. But, if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase." Here, no fraud on the part of the seller is suggested, and the buyer exercised his own judgment. In Parkinson *v.* Lee, 2 East 314, it was held, that, upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and therefore, if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he purchased), such seller is not answerable, though the goods turn out to be unmerchantable. Grose, J., there says: "The question is, whether, in the case of a sale made under the present circumstances, there be any implied undertaking in law that the commodity be merchantable. No express *undertaking is proved to that effect: and there is no fraud imputed [*455 to the defendant. The mode of dealing is, that the plaintiff buys hops from the defendant, who he knows is not the grower, by samples taken from the pockets in which the commodity is close packed. He has an opportunity of judging by the samples such as he finds them at the time. If he doubt the goodness, or do not choose to incur any risk of a latent defect, he may refuse to purchase without a warranty. If an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranties. But, if there be no such warranty, and the seller sell the thing such as he believes it to be, without fraud, I do not know that the law will imply that he sold it on any other terms than what passed in fact. It is the fault of the buyer that he did not insist on a warranty; and if we were to say that there was, notwithstanding, an implied warranty arising from the conditions of the sale, we should again be opening the controversy which existed before the case in Douglas."(b) The principle there laid down, it is submitted, precisely applies here. [WILLES, J.—That was a question of quality, not of the thing being what was represented. The contract here is for the sale of oxalic acid. Was the thing delivered oxalic acid? That was the proper question for the jury: Lamert *v.* Heath, 15 M. & W. 486,† 4 Railw. Cas. 302.] That was like the case of a bank-note, which the party receiving assumes to be genuine, and is not called upon to exercise any judgment on the subject. In Nichol *v.* Godts, 10 Exch. 191,† it was held that an agreement for the sale and delivery of oil described

(a) The first died in 1682, the latter in 1696.
(b) Wiggleworth *v.* Dallison, Dougl. 201.

as "foreign refined rape-oil, *warranted only equal to samples*," is not complied with by the tender of oil which is not "foreign refined rape-
*456] oil," *although it be equal to the quality of the samples.(a) That case, however, is not supported by any authority; it is never spoken of with approbation; and it is not cited in the last edition of Smith's Leading Cases. [WILLES, J.—I summed up in a case at Liverpool in terms precisely in accordance with Nichol *v.* Godts, though I had no recollection of that case at the time; and no exception was taken to my ruling.] If two parties agree to call a thing by a given name, why should they not do so? Every one expects to find some degree of impurity in every manufacture; and it has never been suggested that an article of commerce loses its name and distinctive character on that account. [ERLE, C. J.—Nobody would look for a wilful and fraudulent admixture of a foreign substance.] Fraud was not suggested here; and it can hardly be said that 10 per cent. of adulteration altered the chemical character of the article.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the Court:—

*457] *We are of opinion that there ought to be no rule in this case.

It was argued by Mr. *Lush*, on the part of the defendant, that the Lord Chief Justice misdirected the jury in telling them, that, under the contract in question, the defendant could only perform his part of it by delivering that which in commercial language might properly be said to come under the denomination of oxalic acid. We are of opinion that this direction was right.

Mr. *Lush* contended, that, inasmuch as the defendant had disclaimed all responsibility as to the quality of the article, and at his suggestion the plaintiff had himself inspected it, in order to form his own judgment as to its nature and properties, the description of it in the bought and sold notes as oxalic acid formed no part of the contract between the parties.

But we are of opinion, that, however completely the defendant may have guarded himself against contracting that the thing was of any particular quality, it is not possible to construe the contract in any other way than that it was a part of the agreement that the subject of the sale should be the oxalic acid of commerce. If it were necessary to refer to authority for such a construction, the case of Nichol *v.* Godts, 10 Exch. 191,† cited by Mr. *Lush*, appears to be in point. We think, therefore, that the direction of the Lord Chief Justice was right; and, as the jury found that the thing delivered could not properly be denominated oxalic acid, and my Lord is not dissatisfied with the verdict, it ought not to be disturbed. Rule refused.(b)

(a) Platt, B., there says: "By the terms 'only equal to samples,' I understand that the oil to be delivered was to be equal to the samples in *quality*. But the defendant did not refuse to accept the oil tendered to him, on the ground that it did not equal the samples, but on account of its not being foreign refined rape-oil at all. And the learned judge told the jury, that, if they should think that was so, the defendant was not bound to accept it. That direction was perfectly correct. If the jury had found that the article which the plaintiff tendered was known in the market under the name and description of foreign refined rape-oil, the plaintiff would have been entitled to succeed: but that question was put to the jury, and they were of opinion that it was not known as such. Then, how could it be said that what the plaintiff tendered was what he agreed to sell?"

(b) See Horsfall *v.* Thomas, 1 Hurlst. & Coll. 90.

*SENTANCE *v.* HAWLEY. *Jan.* 21. [*458

On the 14th of May, 1861, the plaintiff, as broker, bought for the defendant at a public sale three lots of sugar in bags, the lots being respectively numbered 67, 68, and 69, the prompt day being the 20th of July. By the terms of sale, payment was to be made either by cash on the 20th of July, by acceptance at seventy days from the day of sale, or on delivery of the warrants,—interest at the rate of 5 per cent. per annum being allowed to the expiration of seventy-three days from the day of sale if payment were made within twenty-one days. On the 25th of May, the plaintiff (according to the usage of the trade), at the request of the defendant, paid the price of lot 67, and obtained a warrant for it, and cleared it at the Custom House. *He at the same time, but without any special instructions from the defendant, paid the price of lots* 68 *and* 69, *and obtained the warrants for the same.* The effect of this payment was, that the risk of loss by fire was transferred from the seller to the buyer.

It was proved to be the common course for brokers, when so employed to clear before prompt one of several lots of sugar in bags bought under one contract, to pay the price and obtain warrants for all the lots, *the broker taking the discount under the conditions of sale.* The defendant not only knew that this was the common course among brokers, and that it had been pursued in former instances in relation to sugars bought for him by the plaintiff; but he was informed by a clerk of the plaintiff shortly after the 25th of May that the plaintiff had so paid the price of lots 67 and 68, and obtained the warrants.

On the 22d of June, the defendant sent instructions to the plaintiff to clear lot 68. On the same day, and before those instructions could in the usual course of business be acted upon, a fire broke out at the bonded warehouse where the sugars were deposited, and they were destroyed:—

Held, that the plaintiff was entitled to recover from the defendant the money so paid by him in respect of lot 68 on the 25th of May, as money paid to his use.

THIS was an action brought by the plaintiff in the Mayor's Court, London, to recover from the defendant 33*l.* 12*s.* 10*d.*, money alleged by the plaintiff to have been paid by him for the use of the defendant at his request; such sum of money having been paid by the plaintiff to take up the warrant for the lot 68 hereafter referred to.

The facts of the case were as follows:—

The plaintiff is a tea and colonial broker, who carries on his business at 92 Great Tower Street, London, and as such broker he had for some time prior to the month of May, 1861, been employed by the defendant, who is a wholesale and retail tea dealer and grocer, carrying on his business in the Westminster Road, and who employed the plaintiff to buy for him on or about the 14th of May, 1861, certain sugars.

The plaintiff accordingly did on the 14th of May, 1861, buy for the defendant 95 bags of sugar, in three lots, numbered respectively, 67, 68, and 69, and delivered to the defendant a bought note thereof, as follows:—

*"London, 14th May, 1861.

"Bought for account of Mr. William Hawley, of P. T. [*459 Meugens, lots 67/9, 95 bags Madras sugar, damp, @ 33/6 per cwt., ex Sedgmore. "WM. SENTANCE.

"Public sale conditions. Prompt, 20 July, 1861. Commission, ½ per cent."

The usual public sale conditions, so far as they bear upon the matters in dispute in this action, are as follows:—

"No. 2. If any broker who may purchase at this sale should not declare his principal in writing within three days, including the day of sale, he will be considered as the principal; and, if any purchaser at this sale, or principal who may be declared afterwards, be not satisfactorily known to the selling brokers, they are to be at liberty

to call immediately on the purchasing broker or bidder at the sale for a deposit of 15*l.* per cent., as expressed in the catalogue, allowing interest thereon. The warrants to be ready for delivery within four days of the date of sale, or the buyer to have the option of cancelling his purchase of such lot or lots for which he cannot obtain the warrants, upon giving a declaration to that effect to the selling brokers at the expiration of the said four days:

"3. Payment for the sugar to be made as follows,—at the option of the selling brokers, either by cash on the 20th July, 1861, by acceptance at seventy days from the day of sale, or on delivery of the warrants; interest at the rate of 5*l.* per cent. per annum being allowed to the expiration of seventy-three days from the day of sale, if such payment be made within twenty-one days afterwards; but, if not, then the interest to be allowed to the 20th July, 1861, only.

"The duty as printed will be allowed on every lot of sugar taken
*460] in bond; and the selling brokers give *notice that they are ready to pay that duty on such lots as may be required for home consumption, so that they may be cleared without delay; but they will not be held responsible for any additional duty that may be imposed:

"4. If any lot or lots of sugar should be required to be taken in bond, interest will be allowed on the duty at the rate of 5*l.* per cent. per annum from the date of delivery of warrants for such lots (if within twenty-one days) to the expiration of seventy-three days from the day of sale; but, if the warrants are not taken within twenty-one days, then the interest will only be allowed from the day of delivery to the prompt day, 1st June, 1861:

"5. The Manilla sugar to be taken at landing weights, and the Howand sugar and Melado at re-weights and revenue tares, with customary allowances, as it now lies at the docks mentioned in the catalogue, where the sugar may be inspected by obtaining an order for that purpose from the selling brokers, and where it will be considered at the risk of the sellers until the prompt day, or delivery of the warrants, or the day of payment, whichever may first happen. Objections as to quality or description will not be entertained unless made within seven days of the day of sale. The damaged portions to be taken with all faults."

The customs duty upon the said sugars so bought had not at the time of the said purchase been paid by the seller; and the said sugars were bought subject to the payment or allowance of the said duty by the seller, and were then lying warehoused in bond at Cotton's Wharf, Tooley Street, Southwark. It is usual for the buyer, in order to get bonded sugars out for consumption, to employ the broker through whom he bought them to pay to the seller's broker
*461] the *price thereof, and to get from him the warrants for delivery thereof out of the warehouse, and to clear the sugars by paying for the buyer at the Custom House the duties payable upon them. According to the usage of the trade, it was competent for the defendant, the buyer, to pay for one or more lots as he pleased, and to leave the rest at the risk of the vendors until prompt.

In the present case, the plaintiff did on the 25th of May, 1861, at the request of the defendant, pay to the seller's broker the price of lot 67 of the sugars so bought as aforesaid, and obtain a warrant for

the same, and clear it at the Custom House, and deliver the warrant duty paid to the defendant; and he did then also, but without any special instructions from the defendant, pay to the seller's brokers the price of lots 68 and 69 of the said sugars, and obtain the warrants not duty paid for those lots also, which warrants he retained.

There was evidence on behalf of the plaintiff, that it was very common for brokers, when so employed, to clear before prompt one of several lots of sugar in bags bought under one contract, to pay the price and obtain warrants for all such lots, the broker taking the discount under the aforesaid conditions of sale. There was also evidence that this course of dealing was convenient for the buyer, and that the defendant knew that this was common among brokers; and that this course had been pursued in former instances in relation to sugars bought by the plaintiff for the defendant; and that in this particular case the defendant was casually told by a clerk of the plaintiff's, shortly after the said 25th of May, that the plaintiff had so paid the price and obtained the warrants of the said lots 68 and 69.

There was also evidence that on one occasion the *defendant complained that the plaintiff had not taken up all the warrants [*462 for sugar in hogsheads bought under the contract when the first warrant was required; and it was explained to him that that practice did not prevail in relation to hogsheads; but, in order to accommodate the defendant, it was done in that particular case.

On Saturday, the 22d of June, 1861, at about 9.30 a.m., the defendant instructed a clerk of the plaintiff's, who then called upon him at his shop in the Westminster Road aforesaid, to clear lot 68, and three other lots, portions of several lots purchased by the defendant through the plaintiff on the 10th of May and the 7th of June, 1861; and the plaintiff received this order from his clerk at 10 o'clock on Saturday morning the 22d of June, 1861.

It was proved on the part of the plaintiff, that, during the week, and more particularly on Saturday in each week, the plaintiff was in the habit of receiving orders from his various principals to clear or pay the duty on lots that they required for the following week's consumption; and that the plaintiff's invariable course of business, and which had been acted upon in previous instances with regard to purchases for the defendant, and with his knowledge, was, to pay for and take up the warrants on the same day as he received them, and, immediately on receiving the orders, if not previously taken up, and during business hours on that day, the plaintiff's clerk made out the various papers required at the Custom House in paying the duty; and that, on the next day (or, if the order was received on Saturday, on the following Monday morning) at 9 o'clock the duties were paid on the various lots required; so that the plaintiff's principals might have the warrants duty paid on their calling or sending for them as usual on that day: and there was *evidence, that, if the warrants for lots 68 and 69 had not been previously paid for and [*463 obtained, the warrant for lot 68 might and would in ordinary course in this case have been paid for and obtained on the Saturday morning, the said 22d of June; and that the payments for warrants and for duty on sugar are distinct and separate payments, made at different times and places.

In accordance with the above practice, the plaintiff's manager, on receiving the above-mentioned order on Saturday morning the said 22d of June, 1861, checked the said order with the various warrants in the plaintiff's possession, and found that the plaintiff had the warrant for lot 68, also the warrants for the other three lots ordered by the defendant to be cleared, and which had been taken by the plaintiff in bond, in the same manner as the warrants for the sugar purchased on the 14th of May, 1861, had been.

The plaintiff's clerk, during business hours on the said Saturday the 22d of June, and before 3 o'clock p.m. on that day, made out the various papers required for clearing the lots at the Custom House, ready to pay the duty at 9 o'clock on the morning of Monday, the 24th of June, 1861, so that the lots could be cleared ready for delivery to the defendant on that day on his calling at the plaintiff's place of business for the warrants duty paid.

About 5 o'clock in the afternoon of Saturday, the said 22d of June, 1861, and after business hours in the city, a fire broke out on the premises where the sugar comprised in lot 68 was warehoused, and it was destroyed by fire. About 9 o'clock on the morning of Monday, the 24th of June, 1861, the plaintiff, coming to business, discovered that the fire had taken place; and, having satisfied himself that lot 68 had been destroyed by the fire, he ordered his clerk
*464] not to pay the *duty on that lot, but had the duty paid on the three other lots which had been ordered to be cleared by the defendant, and which were not on the premises where the fire took place. The defendant's carman, on the same day, called as usual at the plaintiff's place of business for the warrants, and the plaintiff explained to him that he had the warrant for lot 68, but that the lot had been destroyed in the fire, and the duty had consequently not been paid on that lot; and the defendant's carman received from the plaintiff the warrants for the other three lots duty paid.

It was objected on behalf of the defendant, that, upon this state of facts, there was no evidence of the said 33*l.* 12*s.* 10*d.* having been paid by the plaintiff for the defendant, at his request: also, that, under the bought-note and conditions of sale therein referred to, the said goods were at the risk of the plaintiff at the said wharf until the same were delivered and the duty paid thereon, or until the warrant for the same was delivered to the defendant: also that the plaintiff, as the broker and agent of the defendant, the buyer, could not by his own dealings with the seller place him in a better position than that which the seller himself had; and that, as the prompt was not then due, nor any warrant delivered to the defendant, the goods were at the risk of the seller, and by the plaintiff's act at his own risk, and not at the risk of the defendant, and that therefore the loss caused by the said fire must be borne by the plaintiff, and not by the defendant.

The Common Serjeant, acting as the Judge of the Mayor's Court, overruled these objections, and ruled that there was evidence to go to the jury upon which they might find for the plaintiff: and he left the following questions to them,—first,—Was the ordinary course adopted in relation to the warrant in question?—secondly, If not, was the
*465] course adopted one known *and assented to by the defendant? —thirdly, Supposing that, on the 22d of June, the warrants

had not already been in the hands of the plaintiff, would he in the ordinary course of trade have obtained the warrant in question that day?—fourthly (at the request of the defendant's counsel), Was the money sought to be recovered paid at the request of the defendant, and to his use?

The jury found a verdict for the plaintiff for 33*l.* 12*s.* 10*d.*

The question for the determination of this Court was, whether there was evidence to support the verdict. If there was, then the verdict was to stand; but, if there was not, then the verdict was to be set aside, and a nonsuit to be entered, or a new trial was to be directed.

Lush, Q. C., for the appellant.—The short facts are these:—On the 14th of May, 1861, the defendant, through the plaintiff, his broker, bought at a public sale three lots of sugar in bags, the lots being numbered respectively 67, 68, and 69. The prompt day was the 20th of July. By the terms of the sale, payment was to be either by cash on the 20th of July, by acceptance at seventy days from the day of sale, or on delivery of the warrants,—interest at the rate of 5 per cent. per annum being allowed to the expiration of seventy-three days from the day of sale if payment were made within twenty-one days. On the 25th of May, the plaintiff (according to the usage of the trade), at the request of the defendant, paid the price of lot 67, and obtained a warrant for it, and cleared it at the Custom House. *He at the same time, but without any special instructions from the defendant, paid the price of lots* 68 *and* 69, *and obtained the warrants for the same.* On the 22d of June, the defendant gave *instructions to the plaintiff to clear lot 68. On the same day, and before those [*466 instructions could in the usual course of business be acted upon, a fire broke out at the bonded warehouse where the sugars were deposited, and they were destroyed. Under these circumstances, the question is, whether the payment made by the plaintiff on the 25th of May in respect of lot 68 was a payment to the use of the defendant. It was a voluntary payment made by the broker for his own advantage,—to obtain for himself the discount. Could the plaintiff have sued the defendant on the 26th of May for money paid? If not, when did it become money paid to the defendant's use? [WILLIAMS, J.—May not the payment change its character?] That may be so as to money *received:* but money *paid* takes its character from the time of the payment. How can the plaintiff convert a payment made on the 25th of May for his own advantage into a payment made at the defendant's request on the 22d of June? In Davis *v.* Garrett, 6 Bingh. 716 (E. C. L. R. vol. 19), 4 M. & P. 540, the plaintiff put on board the defendant's barge certain lime, to be conveyed from the Medway to London: the master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and, the barge taking fire thereby, the whole was lost: and it was held that the defendant could not qualify his wrong by saying that he would have encountered the same storm had he pursued the direct course. Apply that here,—is it competent to the plaintiff to say that the same result would have followed to the defendant whether the payment was made on the 25th of May or on the 22d of June? Besides, the order given by the defendant on the 25th of May to clear

lot 67, by implication precluded the plaintiff from clearing the other lots at that time on the defendant's account. It is true, the evidence *467] showed *that it is a common thing for brokers to do this; and it is probable that in this instance the defendant knew that it had been done. But the fact of the broker's taking the discount shows that it was an act done for his own benefit. [WILLES, J.—The defendant knew it had been done, and did not complain. You insure my vessel without my authority, and pay the premium. I afterwards learn the fact, and I adopt the policy. At the time I so adopt the policy, the ship had arrived in safety. Am I not liable as for money paid for the premium?] It is submitted not. In the case supposed, the party was not aware at the time he adopted the policy, that it had dropped. A man cannot ratify the act of another unless the other professes at the time to act as his agent. Subsequent ratification is the same as prior authority. Here the broker did not profess to act as the defendant's agent when he made this payment. [WILLIAMS, J.—I do not remember an instance of the doctrine of ratihabitio applying as between the principal and the agent.(a) ERLE, C. J.—The broker would have been entitled, at all events, to make the payment on the 20th of July.] Perhaps he would: and, if he had done so, he might have maintained an action for goods sold, and perhaps also for money paid. On the 22d of June, he is requested to clear the lot, and he does not do it. To make the defendant liable to him upon that order, it was incumbent on the plaintiff to show that he obeyed it.

Hannen (with whom was *Robinson*), contrà.—There are two questions in this case,—first, whether the payment was made with the defendant's authority,—secondly, whether there was a subsequent *468] ratification. No doubt a benefit enures to the broker from the *prepayment: but the case finds that the principal also is benefited thereby. The defendant was aware that it was the custom of the trade for the broker to take the discount; and he knew that it had been done in this instance. There is evidence, too, that he on a former occasion complained of the plaintiff's having omitted to do it. Surely this was evidence from which a jury might conclude that the payment in question was made with the defendant's implied authority. By the previous course of dealing between the parties, the defendant warranted the plaintiff in supposing that he had authority to make the payment on his account. The receipt and acceptance of the sugars would clearly have been a ratification of the previous payment, and would have converted it into a payment made to the use of the defendant. And the facts here found amount to that. [WILLES, J.—The defendant knew before he gave the order to clear lot 68, that the payment had already been made?] The case distinctly so states. He could not ratify one part of what the plaintiff had done, and repudiate the rest.

Lush, in reply.—The defendant's knowledge of the fact of the prepayment cannot fix him with the risk, without any benefit whatever to himself. The broker might have dealt as principal, and debited the defendant with the sugars, and might have sued him for goods sold and delivered, though the defendant had originally employed

(a) See Broom's Legal Maxims, 3d edit. pp. 675–684.

him to buy them for him. But he cannot sue for money paid, when he has not pursued the authority which the defendant gave him.

ERLE, C. J.—I am of opinion that our judgment in this case should be for the plaintiff. The plaintiff was employed as broker, on the 14th of May, 1861, to buy certain sugars for the defendant. According to the *conditions of sale, the lots were to be paid [*469 for by cash on the 20th of July, by acceptance at seventy days from the day of sale, or on delivery of the warrants,—interest at the rate of 5*l.* per cent. per annum being allowed to the expiration of seventy-three days from the day of sale if payment were made within twenty-one days. The plaintiff paid for the lots he bought for the defendant within the twenty-one days, and took the discount for his own benefit. He had authority from the defendant at that time to take up and pay for lot 67, but not for lots 68 and 69. The consequence of this payment was, that the risk of loss by fire was transferred from the seller to the buyer. Subsequently, on the 22d of June, the defendant sent the plaintiff an order to get lot 68 cleared. The proper course of business, if there had been no prepayment, would have been, for the plaintiff to take up the warrant, pay the duty, and clear the sugars. On the day on which this order was so given to the plaintiff, and before the ceremony of paying and clearing could be gone through, a fire occurred at the warehouse where the sugars were stored, and they were destroyed. The question is, whose was the loss. If there had been no prepayment, it would have been the seller's. If the money was paid without the authority of the principal, it would be the broker's. But, if the broker had the authority, express or implied, of his principal for making the payment as he did, the loss must fall upon the principal. Now, knowledge on the part of the principal that it was the ordinary course of business for the broker to make the prepayment, and acquiescence by silence, seems to me to amount to a specific permission to the broker to do so. It is distinctly found as a fact that brokers ordinarily make payments in this way, and that the defendant was aware of it; and it is further found that the defendant knew that *the prepayment had taken place in this [*470 particular instance, and did not object to it. Under the circumstances, I think the plaintiff had a right to consider that as a payment on the defendant's account. The moment the defendant by his order of the 22d of June adopted the former payment as a payment on his account, the sugars stood at his risk.

WILLIAMS, J.—I am of the same opinion. If the order of the 22d of June is to be regarded, as was put by Mr. *Lush*, as an authority for something *to be* done, there would be great difficulty in escaping from his argument. But I think the jury would be justiffed in looking at the order of the 22d of June as an adoption of the previous payment by the plaintiff as agent for the defendant.

The rest of the Court concurring,

Judgment for the plaintiff, with costs.

CAVEY *v.* LEDBITTER. *Jan.* 27.

It is no answer to an action for a nuisance in burning bricks so near to the plaintiff's dwelling-house as to cause substantial annoyance and discomfort to himself and his family, that the act complained of was done at a convenient time and place.

Therefore, in such a case, the refusal of the Judge to leave it to the jury to say whether the bricks had been burned in a convenient place for the purpose, is no misdirection.

The Judge having directed the jury to find for the plaintiff, if there was annoyance to a substantial degree,—Held,—in accordance with the decision of the Exchequer Chamber in Bamford *v.* Turnley, 31 Law J., Q. B. 286,—a proper direction.

THIS was an action against the defendant for an alleged nuisance caused by him to the plaintiff by the burning of bricks by the defendant on his own land and near to the plaintiff's dwelling-house and garden, whereby the plaintiff's dwelling was made unwholesome and uncomfortable, and his plants and trees injured.

*471] *The cause was tried before Wightman, J., at the last Spring Assizes at Maidstone. It appeared that the plaintiff occupied a small cottage and garden at Woolwich, in which latter he grew plants and flowers for sale; and that the defendant, who had taken a field on the opposite side of the road, which contained a quantity of brick-earth, proceeded to make bricks there, and burned them in a clamp within six feet of the fence opposite the plaintiff's premises.

On the part of the defendant it was submitted, on the authority of Hole *v.* Barlow, 4 C. B. N. S. 334 (E. C. L. R. vol. 93),—where it was held, that, in an action for a nuisance arising from the burning of bricks on the defendant's own land near to the plaintiff's dwelling-house, it was no misdirection on the part of the learned Judge to tell the jury that "no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience from its being so carried on;" and that it was properly left to them to say, first, whether the place in which the bricks were burned was a proper and convenient place for the purpose, and, secondly, if they thought the place was not a proper place for the purpose, then, whether the nuisance was such as to make the enjoyment of life and property by the plaintiff uncomfortable,—that the proper question for the jury here was, whether the place where the defendant burned the bricks was a convenient and proper place for the purpose.

The learned Judge, however, refused so to leave it; but he left it to the jury, in substance, to say whether the acts of the defendant rendered the plaintiff's residence substantially uncomfortable, and whether his shrubs and fruit-trees had been thereby injured.

The jury returned a verdict for the plaintiff, damages 20*l.*

*472] *Prentice*, in Easter Term last, obtained a rule nisi *for a new trial, on the ground of misdirection. He relied upon Hole *v.* Barlow as in point. [WILLES, J., referred to the note upon that case in the 3d edition of Gale on Easements, p. 408–410, and observed that the latter part of the judgment did not seem to be correctly reported.]

The argument stood over until Michaelmas Term last, the same point being pending in the Exchequer Chamber in a case of Bamford *v.* Turnley.

Archibald subsequently showed cause, submitting that the question here involved was conclusively (so far as this Court was concerned) disposed of by the decision of the Exchequer Chamber in Bamford *v.* Turnley, 31 Law J., Q. B. 286, which was delivered at the sittings in error after last Trinity Term,—the majority of the Judges (*a*) holding, that, where a man by an act on his own land, such as burning bricks, causes so much annoyance to another in the enjoyment of a neighbouring tenement as to amount primâ facie to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land, and that the fitness of the locality does not prevent the carrying on of an offensive though lawful trade from being an actionable nuisance; but that, whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance was sufficiently great to amount to a nuisance, an action will lie, whatever the locality may be. [ERLE, C. J.—I certainly thought the summing up of the Lord Chief Justice in that case was too wide. He directed the jury, upon the authority of Hole *v.* Barlow, that, if *they [*473 should be of opinion that the spot was a proper and convenient spot, and the burning of the bricks under the circumstances was a reasonable use by the defendant of his own land, the defendant was entitled so to use his land, and would be entitled to a verdict, independently of whether or not there was an interference with the plaintiff's comfort. But I did not understand that I was concurring in the overruling of Hole *v.* Barlow.] In delivering the opinions of Erle, C. J., Keating, J., Wilde, B., and himself, Williams, J., there says: "The question for our consideration appears to be, whether the case of Hole *v.* Barlow was well decided: and we are of opinion that it was not. That decision was plainly founded on a passage in Comyns's Digest, *Action on the Case for a Nuisance* (C.), which is in the following words,—'So, an action does not lie for a reasonable use of my right, though it be to the annoyance of another; as, if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbour.' It may be observed, that, in the language of this dictum (for which no authority is cited by Comyns), there is a want of precision, especially in the words 'reasonable' and 'convenient,' which renders its meaning by no means clear: and it may be doubted whether the Court in Hole *v.* Barlow did not misunderstand it. What is a convenient place? Does the expression mean, as the Court understood it in that case, a place proper and convenient for the purpose of carrying on the trade? Or, does it mean '*a place where a nuisance will not be caused to another?*' It has been pointed out by Mr. W. H. Willes, in his valuable edition of Gale on Easements, p. 410, that this latter sense of the word 'convenient' is the one adopted by Chief Justice Hyde, in Jones *v.* Powell, Palmer 539, where he says, 'A tan-house is necessary, for all men wear shoes; and nevertheless it *may [*474 be pulled down if it be erected to the nuisance of another; in like manner of a glass-house; and they ought to be erected *in places convenient for them.*' In the original Norman-French it is,—'Un tan-house est necessary, car touts wear shoes; et uncore ceo poit estre pull

(*a*) Erle, C. J., Williams, J., Bramwell, B., Keating, J., and Wilde, B.,—Pollock, C. B., dissenting.

down, &c., si est erect al nusance d'auter: et issint de glass-house. Et pur ceux doient estre erect in places convenient pur eux.' The term appears to be used in the same sense when applied to questions as to *public* nuisances. Thus it is said in Hawkins's P. C., Book 1, c. 75, § 10, 'It seems to be agreed that a brew-house erected in such an *inconvenient* place, wherein the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance.' It should seem, therefore, that, just as the use of an offensive trade will be indictable as a public nuisance if it be carried on in an *inconvenient* place, *i. e.* a place where it greatly incommodes a multitude of persons, so it will be actionable as a private nuisance if it be carried on in an *inconvenient* place, *i. e.* a place where it greatly incommodes an individual. If this be the true construction of the expression 'convenient' in the passage from Comyns, the doctrine contained in it amounts to no more than what has long been settled law, viz. that a man may, without being liable to an action, exercise a lawful trade, as, that of a butcher, brewer, or the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him, in rendering his residence there less delectable or agreeable; provided the trade be so conducted that it does not cause what amounts in point of law to a nuisance to the neighbouring house. In Hole *v.* Barlow, however, the Court appear to have read the passage as containing a doctrine that a place may be 'proper and convenient' for the carrying on of a trade, notwithstanding it is a *place where the trade cannot be carried on without causing a nuisance to a neighbour. This is a doctrine which has certainly never been judicially adopted in any case before that of Hole *v.* Barlow; and, moreover, the adoption of it would be inconsistent with the judgments pronounced in some of the cases cited at the bar during the argument, and more especially with the case of Walter *v.* Selfe, 4 De Gex & Sm. 315. And the introduction of such a doctrine into our law would, we think, lead to great inconvenience and hardship; because, as was forcibly urged by Mr. *Mellish*, in arguing for the plaintiff, if the doctrine is to be maintained at all, it must be maintained to the extent, that, however ruinous may be the amount of nuisance caused to a neighbour's property by carrying on an offensive trade, he is without redress if the jury shall deem it right to find that the place where the trade is carried on is a proper and convenient place for the purpose." And Bramwell, B., expresses himself even more unreservedly. The whole question here is, whether the exercise of ownership by the defendant over his own land could be lawful, if it substantially interfered with the plaintiff's right to the uninterrupted enjoyment of his house. [ERLE, C. J.—Is it universally true that the exercise of ownership by the defendant over his own land is unlawful if it is injurious to a neighbour?] If it substantially interferes with the enjoyment of his neighbour's property, as the evidence abundantly showed that this did.

Prentice was about to argue in support of his rule, when Erle, C. J., interposed, and said, that, inasmuch as the decision of this Court must be governed by that of the Exchequer Chamber in Ramford *v.* Turnley, if the case was within it, the Court would take time to look

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into the judgments in that case (copies of which had been *furnished to them), to see how far it was applicable to the facts of the present. [*476

Cur. adv. vult.

ERLE, C. J.—In this case the defendant burned bricks on his own land, near the plaintiff's land, and occasioned annoyance to him thereby.

The learned Judge directed the jury to find for the plaintiff, if there was annoyance to a substantive degree; and he refused to ask them whether the bricks had been burnt in a convenient place: and the question for us is, whether this refusal was a misdirection. My answer is in the negative,—it having been decided in Bamford *v.* Turnley, 31 Law J., Q. B. 286, that to put such a question was a misdirection. And, as a similar question is assumed to have been left to the jury in Hole *v.* Barlow, 4 C. B. N. S. 334 (E. C. L. R. vol. 93), it follows that there was a similar misdirection in that case also in the same respect. But, beyond deciding that the form of question adopted in this case was wrong, the judgment in the Exchequer Chamber does not extend.

In the present case, if the objection had been that the learned Judge told the jury to consider solely the evidence adduced to show discomfort to the plaintiff, and not to take into their consideration, in whole or in part, any evidence showing that the act complained of was an act of ownership on the part of the defendant which was clearly lawful if it did not cause actionable discomfort to a neighbour, and was done with full attention to prevent discomfort in respect of time and place and manner and degree, I think that a misdirection would be made out.

It seems to me that the affairs of life in a dense neighbourhood cannot be carried on without mutual sacrifices of comfort; and that, in all actions for discomfort, the law must regard the principle of mutual *adjustment: and the notion that the degree of discomfort which might sustain an action under some circumstances must therefore do so under all circumstances, is as untenable as the notion that, if the act complained of was done in a convenient time and place, it must therefore be justified, whatever was the degree of annoyance that was occasioned thereby. [*477

I would add that the judgment of Willes, J., in Hole *v.* Barlow appears to me sound, although the question left by Byles, J., has been decided to be wrong.

In the present case, the learned counsel, acting on the precedent of Hole *v.* Barlow, contended for a question wrong in form, and did not contend for his right in substance according to the principle I have above attempted to explain.

I therefore come to the conclusion that the misdirection is not established, and that the rule should be discharged. I should add, that, although the judgment of the court is unanimous, the reasons above given are peculiar to myself.

KEATING, J.—In this case the plaintiff sued the defendant for a nuisance caused by the defendant burning bricks on his own land near to the house of the plaintiff. Mr. Justice Wightman, who tried the cause, left it to the jury to say whether the plaintiff's enjoyment of his property was rendered substantially less comfortable by the acts

of the defendant, and, being required by the counsel for the defendant to leave also to the jury the question whether the defendant had burned the bricks in a convenient place for the purpose, refused to do so.

A rule for a new trial was granted by this Court, upon the ground of misdirection, and upon the authority of the case of Hole *v.* Barlow, 4 C. B. N. S. 334 (E. C. L. R. vol. 93). That was also a case where
*478] the alleged nuisance arose *from burning bricks near to the plaintiff's house; and the learned Judge before whom it was tried is reported to have told the jury, that, if they should think the place where the bricks were burned was a convenient place for the purpose, then, although the plaintiff's enjoyment of his life and property was thereby rendered uncomfortable, he could not maintain any action. A rule nisi was granted by this Court for a new trial on the ground of misdirection, and, upon argument, discharged, the Court holding that the direction was right.

In the case of Bamford *v.* Turnley, 31 Law J., Q. B. 286, the facts were very similar, and the Lord Chief Justice of England directed the jury substantially in conformity with the decision in Hole *v.* Barlow: but the Court of Exchequer Chamber held the direction to be wrong, and, as I understand the judgment (to which I was an assenting party), in terms overruled the decision in Hole *v.* Barlow.

By that decision this Court is of course bound; and, upon its authority, I concur in thinking that the rule for a new trial in the present case should be discharged.

BYLES, J.—I conceive that we are in this case concluded by the decision of a superior Court in Bamford *v.* Turnley. The majority of the Judges in the Court of error not being agreed in their views of the law on this difficult subject, I think I may without impropriety say that I concur in discharging the rule simply on the ground of deference to a binding authority. Rule discharged.

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*479] *THE WANSTEAD LOCAL BOARD OF HEALTH, Appellants; WILLIAM HILL, Respondent. *Jan.* 21.

Brick-making is not necessarily a noxious or offensive business, trade, or manufacture, within the 64th section of the Public Health Act, 1848, 11 & 12 Vict. c. 63.

THIS was a case stated for the opinion of the Court under the 20 & 21 Vict. c. 43.

The above-named William Hill was summoned before two of Her Majesty's justices of the peace for the county of Essex by the Wanstead Local Board of Health, on Saturday, the 2d of August, 1862, on an information or complaint of William Abbott, an officer of the said board, alleging that a noxious or offensive business, trade, or manufacture, to wit, the business, trade, or manufacture of brick-making, had been newly established in a building or place in the parish of Wanstead, being within the district of the said Wanstead Local Board of Health, after the Public Health Act, 1848 (11 & 12 Vict. c. 63) had been applied to the district in which such building or place was situate, without the consent of the said local board; and also

alleging that the said William Hill was the person by or on whose behalf the said business, trade, or manufacture was carried on.

The 64th section of the Public Health Act, 1848, enacts "that the business of a blood-boiler, bone-boiler, fell-monger, slaughterer of cattle, horses, or animals of any description, soap-boiler, tallow-melter, tripe-boiler, or *other noxious or offensive business, trade, or manufacture*, shall not be newly established in any building or place after this Act is applied to the district in which such building or place is situate, without the consent of the local board of health, unless the said general board shall otherwise direct:" and whosoever offends against this enactment, is declared liable to a penalty of 50*l.*, and a further penalty of 40*s.* for each day during which the offence is continued.

*The said information or complaint was one which a justice or justices of the peace had power to determine in a summary way. [*480

On the hearing of the said information or complaint, the said justices determined that brick-making was not necessarily such a noxious or offensive business, trade, or manufacture, as was contemplated by the 64th section of the Public Health Act, 1848, and dismissed the summons accordingly.

This decision was appealed from by the Wanstead Local Board of Health.

The question for the opinion of the Court was, whether the trade or manufacture of brick-making is (necessarily) a noxious or offensive business, trade, or manufacture, intended to be designated by the 64th section of the Public Health Act, 1848.

If the Court should be of opinion that it was such, judgment was to be for the appellants; on the contrary, for the respondent.

Dowdeswell, for the appellants.—The question is whether "brick-making" can be a trade or business within the 64th section of the Public Health Act, 1848. [ERLE, C. J.—That is not the question presented to us: it is, whether it is necessarily an offensive or noxious trade within the meaning of that section. WILLIAMS, J.—The question we are asked, is, whether brick-making is characteristically a noxious or offensive trade within the statute; or, in other words, whether any brick-making can be carried on within the Wanstead district, without the consent of the local board of health.] That brick-making is per se a noxious and offensive trade, is clear. In Walter *v.* Selfe, 4 De Gex & Sm. 315, 2 Law J., Ch. 433, it was so held by Vice-Chancellor Knight Bruce; and still more recently by the Exchequer Chamber in Bamford *v.* Turnley, 31 *Law J., Q. B. 286. In the former case, the Vice-Chancellor, in granting an injunction, says: "The important point for decision may properly, I conceive, be put thus:—Ought this inconvenience to be considered in fact as more than fanciful, or as one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among English people. I am of opinion that this point is against the defendant. As far as the human frame, in an average state of health at least, is concerned, mere insalubrity, mere unwholesomeness, may possibly be [*481

out of the case; but the same may perhaps be asserted of melted tallow and other such inventions, less sweet than wholesome. This does not decide the dispute. Smell may be sickening, though not in a medical sense. Ingredients may be, I believe, mixed with air of such a nature as to affect the palate disagreeably and offensively, though not unwholesomely; and a man's body may be in a state of chronic discomfort, still retaining health, and perhaps suffer more annoyance from impure or fœtid air from being in a hale condition. Nor do I consider it essential to show that vegetable life, or that health, either universally or in particular instances, is noxiously affected by contract with vapour and floating substances proceeding from burning bricks; for, the plaintiffs have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, or whatever their state of health may be." [ERLE, C. J.—I do not understand that the Vice-Chancellor is there dealing with brick-making in the *abstract.] That brick-making is a manufacture, there can be no doubt: and it is equally clear that it is offensive and noxious. [ERLE, C. J.—All the trades mentioned specifically deal with substances which are or must necessarily become in themselves offensive.] It is not confined to animal matters. The object of the statute was, to place the future carrying on of all offensive trades under the immediate control of the local boards of health.

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Petersdorff, Serjt. (with whom was *Tindal Atkinson*), contrà, was not called upon.

ERLE, C. J.—The respondent in this case was proceeded against as a brick-maker by the Wanstead Local Board of Health; and the question is whether the trade or business which he carries on is within the 64th section of the 11 & 12 Vict. c. 63. That section enacts "that the business of a blood-boiler, bone-boiler, fell-monger, slaughterer of cattle, horses, or animals of any description, soap-boiler, tallow-melter, tripe-boiler, or *other noxious or offensive business, trade, or manufacture*, shall not be newly established in any building or place after this Act is applied to the district in which such building or place is situate, without the consent of the local board of health, unless the general board shall otherwise order." The question which the justices have put to us is, whether brick-making was intended by this section to be absolutely prohibited, unless carried on under license from the local board of health of the district. The statute has prohibited the newly establishing of certain specified trades: and then it goes on "or other noxious or offensive business," &c. Is brick-making of necessity a business of a noxious or offensive nature analogous to those specified at the beginning of the clause? I am of opinion that it is not. The business of brick-making *may be carried on in such a manner as not to be a nuisance to anybody. I think the conclusion the justices came to was quite right.

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WILLIAMS, J.—I am not satisfied that the justices were wrong in the decision they arrived at in this case. There is no question as to the mode of conducting the particular establishment. But the question put to us is simply this,—whether the trade or manufacture of

brick-making is necessarily a noxious or offensive business, trade, or manufacture intended to be designated by the 64th section of the Public Health Act, 1848. The case has been argued by Mr. *Dowdeswell* as if the question were whether brick-making could be noxious or offensive. That clearly is not the test. There may be a vast number of trades which are so conducted as to be in one sense both public and private nuisances, and yet which it would be most unjust to call in the abstract noxious or offensive trades. No doubt there may be trades of a nature not generally known, as to which it would be necessary to have evidence to show whether or not they are noxious or offensive. But everybody knows what the trade of a brick-maker is: and, applying that general knowledge, I am not satisfied that the justices were wrong in holding that the trade of brick-making is not a noxious or offensive trade within the contemplation of this statute.

WILLES, J.—I am of the same opinion. It is necessary to be extremely cautious in construing this act, whereby trades are brought within the jurisdiction of the justices. The nicest questions of law may thus be brought to be tried at petty sessions,—questions upon which the Judges of this Court and those of the Exchequer have differed, and upon which many judicial minds have gone astray; upon which side I will not venture *to suggest. The cases of [*484
Hole *v.* Barlow, 4 C. B. N. S. 334 (E. C. L. R. vol. 93), and Bamford *v.* Turnley, 31 L. J., Q. B. 286, show how absurd it would be to leave such questions to be decided by inferior tribunals. The case of Hole *v.* Barlow, I may observe, has been misunderstood. The judgment of at least one of the Judges in that case proceeded on the ground that a man's enjoyment of his own property is necessarily in some degree subservient to the general good of the public. It is still, I apprehend, an open question, which must one day be determined by the highest tribunal, whether one who carries on a business under reasonable circumstances of place, time, and otherwise, can be said to be guilty of an actionable nuisance. According to Chief Baron Comyns and Hole *v.* Barlow, he may: according to some of the Judges in the Exchequer Chamber, he may not. I do not pretend to offer an opinion upon a subject which has been considered doubtful by so many superior intellects. But I cannot help thinking that it never could have been intended that these or analogous questions should be submitted to the judgment of the justices in petty sessions. But it appears to me to be very easy to hold that a brick-yard is not within any of the definitions in the Act, nor within the general words as general words of that sort are usually construed, because, as was pointed out by my Lord, the substances which are dealt with in the trades which are specified are substances which, without anything being done to them, must be, or by progress of time must necessarily become, a nuisance and annoyance to the neighbourhood. I need hardly say that brick-making does not come within that category.

KEATING, J.—I entirely agree with my Lord and my two learned Brothers that the respondent in this case is entitled to judgment.

Decision affirmed, with costs.

*485] *JOHN BROWN, JOSEPH MELBOURNE, HENRY CHAPMAN, and WALTER PETERS, Appellants; CHARLES TURNER, Respondent.

A., B., C., and D., four labourers, were met by a police constable early one Sunday morning on the high road leading from Coggeshall to Braintree. Suspecting from their appearance that they had been poaching, and seeing that there was something bulky in the pocket of A., the constable searched him (the other three walking away), and drew from his pocket five wild rabbits which had been recently killed, and an iron spud. The constable then followed B., and found in his pocket a net suitable for taking rabbits and which appeared to have been recently used, and some rabbit's fur, and fresh blood on his coat-cuffs. The constable afterwards found that C. had at a subsequent hour on the same morning sold a dead wild rabbit at a beerhouse for 6*d*. As to D., the only evidence, besides his being seen in company with the others on the road, was, that his clothes and shoes were found to be very wet and dirty:—

Held, that the magistrates were justified in inferring from the above evidence, as against A., B., and C., that they had been unlawfully on some land in search or pursuit of game, within the 25 & 26 Vict. c. 114, although there was no proof that either of the parties had been seen off the high road: but that the evidence against D. was not sufficient to justify a conviction.

THIS was a case stated for the opinion of the Court under the statute 20 & 21 Vict. c. 43.

At the petty sessions holden at Bocking, in the county of Essex, on the 5th of November, 1862, before, &c., an information was preferred by Charles Turner, of Bocking, in the said county, police constable (hereinafter called the respondent), against John Brown the younger, of Braintree, in the county of Essex, labourer, Joseph Melbourne, of Bocking, in the same county, labourer, Henry Chapman, of Braintree aforesaid, labourer, and Walter Peters, of Braintree, aforesaid, labourer (hereinafter called the appellants), under the 25 & 26 Vict. c. 114, s. 2, charging the appellants with having been on the 12th of October, 1862, at the parish of Braintree, in the county of Essex, in company together in a certain highway there, and being with good cause suspected of having come from land where they had been unlawfully in search and pursuit of game, and aiding and abetting each other therein; and charging the said appellant Brown with having in his possession five dead rabbits unlawfully obtained: and, upon the hearing of the said information before us, in the presence of the said parties respectively, we the said justices con-
*486] victed the said appellants *respectively of the said offence; and we adjudged each of them the said appellants for his said offence to forfeit and pay the sum of 1*s*., to be paid and applied according to law, and also to pay to the said respondent the sum of 6*s*. 6*d*. for his costs in that behalf; and, if the said several sums were not paid forthwith, we adjudged each of the said appellants respectively to be imprisoned in the House of Correction at Springfield, in the said county of Essex, and there to be kept to hard labour for the space of fourteen days, unless the said several sums should be sooner paid.

And whereas the appellants, being dissatisfied with our determination, upon the hearing of the said information, as being erroneous in point of law, have applied to us in writing, within three days after the said determination, to state and sign a case setting forth the facts and the grounds of such our determination, for the opinion thereon of this Court: Now, therefore, we, the said justices, in compliance

with the said application and the provisions of the said statute, do hereby state and sign such case as follows:—

Upon the hearing of the aforesaid information, it appeared that it was laid by the respondent in his character of a police constable, and in pursuance of the express directions of the statute; and that the respondent had no personal interest in the matter. It was also proved, on the part of the respondent, that, while on duty, at 6.30 A.M. of the day mentioned in the information, being Sunday, he met the appellants walking together in company along the high road from Coggeshall to Braintree, at the entrance to the town of Braintree, where they reside, and noticed that the pockets of Brown contained something bulky; that Brown at first refused to allow himself to be searched, but afterwards submitted, when five dead wild rabbits, recently killed, and an iron spud were *found upon him. Whilst Brown was being [*487
searched, the other three appellants walked away. It was also proved, that, on going after Melbourne the same day, he was found in bed; and, on examining his clothes and shoes, they were found very wet and dirty, and in fact more so than they would have become from walking in the road. It was also proved, that, on going after Chapman the same day, and searching his clothes, a net suitable for the purpose of taking rabbits, and which appeared to have been recently used, was found in one of the pockets, and, on taking the net out, some rabbit's fur flew from it, as well as from the pocket of his coat; and the cuffs of his coat were smeared with fresh blood. It was also proved that about 10 o'clock in the morning of the same day, Peters sold a wild dead rabbit, at a beerhouse, for sixpence.

No evidence was adduced to prove that either of the appellants had been seen off the Queen's highway at any time during the previous night: but it was proved, that, at 6.3 the same morning, the appellants were seen together on the aforesaid high road leading from Coggeshall to Braintree, near a farm called Hatches, and about a mile and a half from the latter town. No evidence was given on the one hand to show that the rabbits were unlawfully obtained, or, on the other hand, that they were lawfully obtained.

The questions of law arising on the above statement are,—first, whether or not it was incumbent upon the respondent to show affirmatively that the appellants had been unlawfully on any land in search or pursuit of game, and had so become unlawfully possessed of the rabbits,—secondly, whether or not there was in point of law evidence from which the justices might infer that the appellants had obtained such game by unlawfully going on any land in search or pursuit *of game, or had used any gun, net, or engine used for the [*488
killing or taking game, or had been accessory thereto: whereupon the opinion of this Court is asked upon the said questions of law, whether or not the said justices were correct in their aforesaid determination, and as to what further should be done in the premises.

Martin, for the appellants.—The 2d section of the 25 & 26 Vict. c. 114 enacts that "it shall be lawful for any constable or peace officer in any county, borough, or place in Great Britian and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he *shall have been* unlawfully in search or pursuit of game, or any person

aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace assembled in petty sessions, as provided in the 18 & 19 Vict. c. 126, s. 9, as far as regards England and Ireland, and before a sheriff or any two justices of the peace in Scotland; and, if such person shall have obtained such game by unlawfully going on any land in search or pursuit of
*489] game, or shall have used any such article or thing as aforesaid *for unlawfully killing or taking game, or shall have been accessary thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding 5*l.*, and shall forfeit such game, guns," &c. The question is whether it is incumbent on the officer, under that section, to show that the persons charged were upon some land unlawfully in pursuit of game, or whether the magistrates may infer from the mere circumstance of their having game in their possession that they had been so trespassing. It is submitted that some evidence must be given of the commission of the offence specified, otherwise the magistrates cannot lawfully convict.

Philbrick, contrà.—The question is, whether the statement of the case discloses *any* evidence upon which the magistrates could act. What was the mischief which the legislature aimed at? The 30th section of the Game Act, 1 & 2 W. 4, c. 32, recited, that, "whereas, after the commencement of that Act, game would become an article which might be legally bought and sold, and it was therefore just and reasonable to provide some more summary means than now by law exist for protecting the same from trespassers:" and it enacted, "that, if any person whatsoever shall commit any trespass by entering or being in the daytime(*a*) upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction." If it were necessary to
*490] give affirmative evidence as to whose land was *entered, there was ample remedy under that section. The question is whether the recent statute was not intended to give a new remedy for a fresh offence. The Act is intituled "An Act for the prevention of poaching:" and it recites that "it is expedient that the laws now in force for the better detection and prevention of poaching should be amended." The 1st section defines what shall be considered game, and includes rabbits. The 2d section creates three distinct offences,—being on any land unlawfully in search or pursuit of game,—aiding or abetting a person so offending,—and having in his possession any

(*a*) Between the beginning of the last hour before sunrise and the expiration of the first hour after sunset: s. 34.

game unlawfully obtained, or any gun, net, or engine used for the killing or taking game. The facts show that the appellants were out at an early hour on Sunday morning under circumstances calculated to excite suspicion and to warrant a reasonable inference that they had been in pursuit of rabbits. [WILLIAMS, J.—What evidence is there against Melbourne? All I find is, that it is suggested that his shoes were dirty.] He was found with the others on the high road. He was clearly an accessary within the Act. That a "highway" comes within the definition of "any land" is clear from The Queen *v.* Pratt, 4 Ellis & B. 860 (E. C. L. R. vol. 82), 1 Dears. C. C. 502. [ERLE, C. J.—The defendant there was not using the road lawfully in the exercise of the right of way, but for another purpose, viz. in search of game, and so he was held to be a trespasser.] It is submitted that the court, sitting as a court of appeal, cannot say there was *no* evidence in this case. There is always extreme difficulty in these cases to show the particular land upon which the nets are used or from which the game has been taken. The 7 & 8 G. 4, c. 29, s. 26, relating to the stealing of deer, shows that, where the legislature intended to deal with enclosed land, they knew how to express themselves. [*491 *The recent statute has not yet received a judicial construction: but it is submitted that it clearly was intended not only to give the justices a power of prevention, but also to create a new and substantive offence.

Martin, in reply.—The question is, whether the facts which they have stated warranted the justices in inferring that the appellants had been guilty of any one of the offences specified in the Act, or whether they were not bound to have positive affirmative evidence that the parties were seen coming from some land where they had been for the purpose of snaring or netting game. There is no evidence that the appellants were ever seen off the high road. If there had been such evidence, the justices might possibly have inferred that they were there for the unlawful purpose suggested. [WILLIAMS, J.—In the case of burglary, may you not presume that the prisoner is guilty, from the fact of the stolen property being found in his possession shortly after it was stolen, without any evidence of his having been seen in the house?] There it must be shown that a burglary has been committed and that the property stolen was found in the prisoner's possession. [WILLIAMS, J.—Here, one of the appellants is found with *wild* rabbits in his possession, and another with a net which had evidently been recently used for catching rabbits.] The rabbits might have been caught in the man's own garden; or he might have bought them. It is submitted that the justices were not warranted in inferring guilt from circumstances which at the most amounted to mere suspicion.

ERLE, C. J.—This is an appeal against a conviction under the statute for the prevention of poaching, 25 & 26 Vict. c. 114. As to all the appellants except *Joseph Melbourne, I am of opinion [*492 that the conviction is right, and must be affirmed. The 2d section of the statute enacts that "it shall be lawful for any constable or peace officer in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land

where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and, should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace assembled in petty sessions, as provided in the 18 & 19 Vict. c. 126, s. 9, as far as regards England and Ireland, and before a sheriff or any two justices of the peace in Scotland; and, if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessary thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding 5*l.*, and shall forfeit such game, guns," &c. It seems to me that Brown, Chapman, and Peters were, under the circumstances stated, properly convicted, although there was no eye-witness to prove that they *493] *had been upon any land in search or pursuit of game. I am of opinion that the magistrates were quite right in applying to this Act the ordinary rules of evidence; and that, if the circumstances proved before them fairly warranted the inference that the parties charged had been guilty of the offence imputed to them, they had the same right to make inferences as any other tribunal has from circumstantial evidence. It is too obvious a remark to make, that, in many cases, a greater degree of reliance can be placed on circumstantial than upon direct evidence. It is not necessary that the parties should be seen in the act of committing the offence. What are the circumstances here? These three persons,—Brown, Chapman, and Peters,—were found together early on Sunday morning on the high road leading from Coggeshall to Braintree, Brown having in his pocket five dead wild rabbits, which had been recently killed; and, on going after Chapman, the officer finds upon him a net suitable for the purpose of taking rabbits, and which appeared to have been recently used, and also some rabbit's fur in his pocket, and fresh blood upon his coat-cuffs: and it was afterwards found that Peters had at 10 o'clock on the same morning sold a wild rabbit at a beerhouse for 6*d.* All these facts were to be offered to the minds of the magistrates to satisfy them that these three persons had been engaged in killing rabbits, and to induce them to infer that they had come from land where they had been unlawfully in search and pursuit of game, and aiding and abetting each other therein. If they had no land of their own, it would be puerile to suppose that they had accidentally stumbled on the rabbits on the high road. The magistrates had to deal with the facts according to the fair natural inference which those facts lead to. The legislature *494] have, as it appears to me, in the recent *statute, intentionally departed from the language of the 1 & 2 W. 4, c. 32, which, as was suggested by Mr. *Philbrick*, was quite sufficient for the purpose

if the positive evidence of an eye-witness was required. The recent Act was evidently intended to give further powers and further remedies for the prevention and punishment of poaching. Finding this strong presumptive evidence of guilt against these persons, unless they were able to give a good account of themselves, the magistrates were clearly justified in convicting them. They had ample materials before them to warrant the inference of guilt. It was not necessary to prove from whose land the rabbits were taken. The only question was, whether they had been unlawfully taken from any land. As to Melbourne, I think the evidence was hardly sufficient. All that was proved against him was, that he was seen on the high road in company with the three men who were shown to have been immediately connected with the death of the rabbits, and that his clothes and shoes were found to be very wet and dirty. It is quite consistent with his being found in company with the others, that he may have joined them as they were returning from committing the offence. If Melbourne had been seen going out with the others the night before, and was found returning with them, I should have thought the evidence against him also sufficient. Upon the whole, I think the conviction should be affirmed as against Brown, Chapman, and Peters, and reversed as against Melbourne.

WILLIAMS, J.—I am entirely of the same opinion. The only question which the magistrates have reserved for our consideration is the same that would have arisen if the Act of Parliament had directed that persons found under circumstances like those disclosed in [*495 *this case should be tried for the offence of unlawfully pursuing and taking game on land. If in such a case evidence like that here detailed had been given, the Judge would have said that the evidence was insufficient as against Melbourne, but quite enough to charge the other three. The parties are found in company at an early hour in the morning, one of them having five recently-killed wild rabbits in his pocket, another a net which had been recently used for taking rabbits, and on which, as well as in the pocket from which it was taken, rabbit's fur was found, and fresh blood was on his cuffs; and, as to the third, it was proved that he had that morning sold a wild rabbit. It has been suggested that the men might have found the rabbits in their own garden. But then we must look at what their conduct was when stopped by the constable. That conduct was clearly consistent only with the consciousness that they had improperly become possessed of the game. I think the magistrates drew the proper inference from the evidence as against the three, but were hardly justified as to the fourth.

The rest of the Court concurring, Rule accordingly.

*496] *WILLIAM WILSON, Appellant; JOSEPH COOKSON, Respondent.
JOSEPH FISHER, Appellant; JOHN JONES, Respondent.
Feb. 12.

To constitute an offence against the Truck Act, 1 & 2 W. 4, c. 37, it is not necessary that the payment of wages in goods instead of money should be the result of any contract or understanding between the employer and the workman: the mere payment is enough.

And the offence is not purged by a subsequent payment in money, whether made voluntarily or compulsorily under an order of justices.

THESE were cases stated for the opinion of the Court under the statute 1 & 2 W. 4, c. 37, known as the Truck Act. The facts relating to the first were as follows:—

At a petty sessions of Her Majesty's justices of the peace for the borough of Walsall, a summons, issued at the instance of the appellant, who was the informant, was heard before two of Her Majesty's justices of the peace for the said borough on Monday, the 10th of November, 1862, when the following evidence was heard in support of the case, which was dismissed by the justices, on the ground, that, in their opinion, there was no contract or understanding between the respondent Cookson and his servant Fisher that the latter should take goods in payment of his wages; but that, when he did take goods, it was entirely a voluntary act on his part, he having the option to receive cash whenever he chose.

The respondent was a butty miner at the Bently Colliery. He was also a provision dealer having his shop and residence at Walsall.

Joseph Fisher, labourer, Wolverhampton, said: "On the 14th of August, 1861, I was engaged to work for Joseph Cookson. There was no certain engagement. I went to the work to look after a job, and was told to come again in the morning. I went next morning to work at Bently Colliery. I was set to fill barrows and get the surface off the ironstone. I continued to work for him for about twelve
*497] months. It was an *open work. There was no pit-shaft to go down to the work. I saw Cookson when I commenced the work. He saw me at work. On the 6th of August, 1862, I went to Cookson's shop, in Bridgman Street, Walsall, and had goods to the amount of 1*s.* 1½*d.*, which was stopped out of my wages at the next reckoning. I believe both Cookson and his wife were in the shop when I had the 1*s.* 1½*d.* in goods. Cookson said we were to pick the ironstone out of the clay; and that was what he was paying us for doing. I cannot say what I was doing on the 6th of August. I was at work for Cookson at this place."

On cross-examination, he said: "I have been an informer fifty times. I kept an account of my work, and the manner of payment from the time I began to work for Cookson. I never asked Peter Murray to keep an account of the goods and work, that we might summon Cookson, and divide the money; nor John Riley either. I have heard Cookson say he did not compel any man to go to the shop for goods. I never told any one that the magistrates had nothing to do with these cases, and that it was very kind of Cookson to let us have goods. I had no money; and Handley, the 'doggy,' found me food the first day I went to work. I cannot say what work I was doing on the 6th of August, or seven days before or after. I was

engaged to do any sort of work Cookson set me to do. Sometimes I removed bat and stone off the bottom from under the clay. (Witness produced his private book, which he stated he kept from the time he entered Cookson's service, and which contained the following entry, —'6th August. Goods 1*s.* 1½*d.*') In the 'shop book' (the book in which the provisions and the cash supplied to Fisher were entered), there is an entry of 2*s.*; but I had 1*s.* 1½*d.* in goods, and the rest in cash (the 'shop book' showed the entry 'Goods *2*s.*'). During the whole time I worked for Cookson, I was engaged in getting [*498 clay, shifting stuff, and picking stone. I might have had the 2*s.* in cash, I dare say, if I had asked for it: but I did not ask for cash. I had goods and cash to the amount of 2*s.* I have had money five times a week; and I could have had it six times a week, if I had liked."

Phipson, for the appellant.—The decision of the justices was clearly wrong. Fisher was proved to have been paid in goods instead of in money; and that is all that the information charges. The 1st section of the Truck Act, 1 & 2 W. 4, c. 37, enacts, that, "in all contracts hereafter to be made for the hiring of any artificer in any of the trades hereinafter enumerated,(*a*) *or for the performance by any artificer of any labour in any of the said trades, the wages [*499 of such artificer shall be made payable in the current coin of this realm only, and not otherwise; and that if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be and is hereby declared illegal and void." The 2d section enacts, that, "if in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated, and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void." The 3d section enacts that "the entire amount of the wages earned by or payable to any artificer in any of

(*a*) The 19th section enacts "that nothing herein contained shall extend to any artificer, workman, or labourer, or other person engaged or employed in any manufacture, trade, or occupation, excepting only artificers, workmen, labourers, and other persons employed in the several manufactures, trades, and occupations following, that is to say, in or about the making, casting, converting, or manufacturing of iron or steel, or any parts, branches, or processes thereof; or in or about the working or getting of any mines of coal, ironstone, limestone, salt-rock: or in or about the working or getting of stone, slate, or clay; or in the making or preparing of salt, bricks, tiles, or quarries; or in or about the making or manufacturing of any kind of nails, chains, rivets, anvils, vices, spades, shovels, screws, keys, locks, bolts, hinges, or any other articles or hardwares made of iron or steel, or of iron and steel combined, or of any plated articles of cutlery, or of any goods or wares made of brass, tin, lead, pewter, or other metal, or of any japanned goods or wares whatsoever; or in or about the making, spinning, throwing, twisting, doubling, winding, weaving, combing, knitting, bleaching, dyeing, printing, or otherwise preparing of any kinds of woollen, worsted, yarn, stuff, jersey, linen, fustian, cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk manufactures whatsoever, or in or about any manufactures whatsoever made of the said last-mentioned materials, whether the same be or be not mixed one with another; or in or about the making or otherwise preparing, ornamenting, or finishing any glass, porcelain, china, or earthenware whatsoever, or any parts, branches, or processes thereof, or any materials used in any of such last-mentioned trades or employments; or in or about the making or preparing of bone, thread, silk, or cotton lace, or of lace made of any mixed materials."

the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivery to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned,(a) shall *500] be and is hereby declared *illegal, null, and void." The 4th section enacts, that "every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servants' wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this realm." The 5th and 6th sections respectively prohibit any set-off or action by the employer in respect of goods supplied to the artificer. And the 9th section enacts that "any employer of any artificer in any of the trades hereinafter enumerated, who shall, by himself or by the agency of any other person or persons, directly or indirectly enter into any contract or make any payment hereby declared illegal, shall for the first offence forfeit a sum not exceeding 10*l.* nor less than 5*l.*, and for the second offence any sum not exceeding 20*l.* nor less than 10*l.*, and, in case of a third offence, any such employer shall be and be deemed guilty of a misdemeanor, and being thereof convicted, shall be punished by fine only, at the discretion of the Court, so that the fines shall not in any case exceed the sum of 100*l.*" In the present case, there was a payment in goods to the extent of 1*s.* 1½*d.* That clearly was an illegal payment and an infraction of the Act, and the employer incurred a penalty. Whether there was a contract or understanding between the employer and the artificer or not is altogether immaterial; and the magistrates had no right to go into the question of contract or no contract. But, if they were right in so doing, it is clear that there was a contract here within the definition given in s. 25, which provides, "that, within the meaning and for the purposes aforesaid, any *501] agreement, understanding, device, contrivance, collusion, or *arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a 'contract.'"

No one appeared for the respondent.

WILLIAMS, J.—We will hear the next case before we dispose of this one.

Joseph Fisher, Appellant; *John Jones*, Respondent.

At a petty sessions of Her Majesty's justices of the peace held in and for the borough of Walsall, a summons issued at the instance of the above-named appellant, who was the informant, under the Truck Act, 1 & 2 W. 4, c. 37, was heard before two of Her Majesty's justices of the peace for the borough of Walsall on the 10th of November, 1862, when the following evidence was heard in support and in

(a) Section 8 excepts payments made, if the artificer consents, in bank-notes or checks.

defence; and the case was dismissed, on the ground, that in the opinion of the justices, the payment under the order of justices upon the complaint of Robert Blakemore, of 4*l.* 17*s.*, the amount claimed by him for wages due from the said John Jones, and which amount included the sum of 15*s.* in respect of which the present complaint is made, was a payment of the wages in the current coin of the realm within the meaning of the Act of Parliament, and was an answer to the information, although the goods might have been supplied previously.

The respondent is an iron-master and owner of the Birch Hills Colliery, Walsall.

*Robert Blakemore, puddler, Wolverhampton, said: "I have worked for some time for Mr. Jones as a puddler, at the [*502 Birch Hills furnaces, in the borough of Walsall. On the 6th of August, 1862, I worked for him as a puddler at Birch Hills. Wages were due to me from Mr. Jones on that day for work I had done for him as a puddler; and on that day I had 15*s.* worth of goods from Mr. Jones's tommy shop at the Birch Hills. On the reckoning on the 16th of August, 1*l.* was deducted from my wages, for 15*s* and 5*s*. I had had in goods. I summoned Mr. Jones before the justices for 4*l.* 17*s.* wages, which amount I had received in goods. This included the 15*s.* the subject of the present complaint. Mr. Jones was ordered to pay me the 4*l.* 17*s.* wages, and costs; and he paid the money, I believe, to the clerk to the justices, who paid it to my attorney; and I have received it from my attorney. I have received cash for the whole of the wages I have earned from Mr. Jones; the 15*s.* mentioned in Fisher's complaint is included in the 4*l.* 17*s.* I claimed from Mr. Jones for wages."

Elizabeth Blakemore, wife of the last witness: "My husband worked at Jones's furnaces in this borough, as a puddler, in August last. On the 6th of August, I had 15*s.* worth of goods on account of my husband's wages. I had it from Jones's tommy shop at the Birch Hills, in this borough; and I was told to go for it there by Mr. Jones's furnace manager, Joseph Talbot."

Phipson, for the appellant.—In this case the information charged the respondent, an iron-master, with having paid to one Blakemore, a puddler in his employ, 15*s.* in goods. It appears that the employer had been summoned by the workman for 4*l.* 17*s.* which had been paid in goods (and which sum included the 15*s.* *in question), and [*503 had been ordered to pay that sum with costs: and the sole question is, whether that recovery condones the offence. The justices held, that, having paid the amount of wages under the order, that was a payment by the employer in the current coin of the realm, and therefore the employer had been guilty of no offence. In this they were clearly wrong. The offence was complete the moment the payment was made in goods instead of money, and could not be cured or the penalty averted by any subsequent payment, whether voluntary or compulsory.

Grant, for the respondent.—If the argument on the part of the appellant prevails, the consequence will be that the respondent is thrice punished for one offence. [WILLIAMS, J.—The only question is, whether the offence is purged by a subsequent compulsory pay-

ment. I think not.] It must be borne in mind that the payment was made before the information was brought. The Court will, it is submitted, construe the Act strictly, and not inflict this cumulative punishment. [KEATING, J.—If the penalties were not cumulative, the employer might by the payment of 5*s*. escape a penalty of 10*l*.]

WILLIAMS, J.—I am of opinion that in both these cases the decision of the justices was wrong, and that our judgment must be for the appellants. The first case arises upon an information under the 1 & 2 W. 4, c. 37, commonly called the Truck Act; and the gist of the information is, not as the magistrates seem to have supposed, the entering into a contract to pay wages in goods, but for unlawfully paying wages to Fisher in goods instead of in the current coin of the realm. The question is whether that information was sustained by the evidence. It appears to me that it was. *The information is founded on the 9th section of the Act, which enacts that "any employer of any artificer in any of the trades hereinafter enumerated, who shall, by himself or by the agency of any other person or persons, directly or indirectly enter into any contract *or make any payment* hereby declared illegal, shall for the first offence forfeit a sum not exceeding 10*l*. nor less than 5*l*.," &c. The question is whether the facts disclosed by this case show that the respondent did make a payment which is declared illegal by the Act. It is clear that he did: he paid a part of the wages by the delivery of goods to the workman to whom the wages were due. That is expressly declared by the Act to be illegal, by s. 3, which enacts "that the entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivery to him of goods, or otherwise than in the current coin aforesaid, shall be and is hereby declared illegal, null, and void." This case comes directly within the operation of s. 9, and there ought in my opinion to have been a conviction. *504]

In the second case, the information is in the same terms and under the same Act: and there seems no room for doubt that the respondent was guilty of a violation of the Act by delivering goods instead of money in payment of Blakemore's wages. Indeed, the justices themselves do not seem to have entertained any doubt about that: but they thought that the ultimate payment made under the order of justices upon the complaint of Blakemore was a payment of the wages in the current coin of the realm within the *meaning of the Act of Parliament, and was an answer to the information. The question, however, which the justices had to determine, was, whether or not the respondent was guilty of the offence with which he was charged. That he was so, is conceded: nor is he the less so because he afterwards makes the payment in the current coin of the realm, whether voluntarily or under the coercion of legal process. There is nothing in the Act of Parliament, or in the nature of the offence itself, to warrant the notion that a party who has committed the offence can purge it by afterwards paying the wages in money. I am clearly *505]

of opinion that both decisions are erroneous, and that there must be judgment in each case for the appellant.

WILLES, J.—I am of the same opinion. The intention of the statute is perfectly clear. The 1st section makes null and void all contracts for hiring in the trades afterwards enumerated in which any part of the wages shall be agreed to be paid otherwise than in money. The 3d section is to the effect that, whether there be any contract for that purpose or not, any payment of wages made otherwise than in the current coin of the realm shall be void. The 4th section enables the workman to recover by process of law so much of any wages earned by him as shall not have been paid in money. The 5th section precludes the master from setting off the price of any goods he may have supplied against a claim by the workman for wages: and the 6th section prohibits the master from recovering the price of goods supplied to a workman on account of wages at any shop kept by or belonging to the employer. Then comes the 9th section, which imposes a penalty upon any employer who shall either directly or indirectly enter into any contract or make any payment thereby declared illegal. That being so, it is obvious that the [*506 magistrates in the first case have misunderstood the intention of the legislature, because they hold that the employer was not guilty of an offence within the Act, if the workman had the option of receiving his wages in cash if he thought proper, and if there was no contract or understanding between the workman and the employer that the wages were to be paid otherwise than in money. In this they were clearly wrong.

As to the second case, I also think the magistrates were wrong in holding that the payment of the sum awarded against the respondent by the justices upon the complaint of Blakemore, was a payment of the wages in the current coin of the realm within the meaning of the statute, because the provisions of the statute are clearly cumulative. The respondent was bound to pay in money, notwithstanding he had previously paid the wages in goods: and he is further to pay a penalty of 10*l*. The former is not properly speaking a penalty. The case is plainly within the mischief of the Act. The result is that both cases must go back to the justices with an intimation of our opinion that the respondents should have been convicted.

KEATING, J.—I am entirely of the same opinion. Under no pretence may the wages of the artificers enumerated in the Act be paid otherwise than in the current coin of the realm. So express is the statute to that effect, that by s. 8 even a payment in bank notes is only permitted "if such artificer shall freely consent" to receive payment in that shape. In the first case, it is clear that the penalty was incurred by the payment in goods, although there was no contract or understanding that the wages should be so paid. In both *cases we must assume that the goods supplied were not such [*507 as are expected by the 23d section. However stringent the provisions of the Act, the magistrates clearly ought to have convicted the respondents in both cases. Decisions reversed.

BERRIDGE *v.* ABBOTT. *Feb.* 12.

The deed of arrangement contemplated by the 192d section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), is one which is made for the benefit of *all* the creditors of the debtor, and to which all may become parties.

A deed therefore, which in terms excludes all creditors who do not execute within a given time, affords no defence to an action by a creditor not a party thereto.

THIS was an action by the endorsee against the acceptor of a bill of exchange for 339*l.* 9*s.* 4*d.*, with counts for goods sold and delivered, lighterage, money lent, money paid, and money found due upon accounts stated.

Plea,—that, before and at the time of the making of the deed hereinafter mentioned, the defendant was indebted to the parties thereto of the third part respectively in divers sums of money which the defendant was then unable to discharge: that, after the accruing of the causes of action in the declaration mentioned, and after the passing of The Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), a certain trust-deed for the benefit of the defendant's creditors was made, which deed was and is in the words and figures following, that is to say,—"This indenture, made the 28th day of January, 1862, between Edwin Morton Abbott, of The Brewery, Bow, in the county of Middlesex, brewer, of the first part, Edgar Smallfield, of, &c. (a trustee for the creditors of the said Edwin Morton Abbott, hereinafter called 'the said trustee'), of the second part, and *the several other persons whose names and seals* *508] *are hereunto subscribed and set, *being respectively creditors of the said Edwin Morton Abbott, of the third part:* Whereas, the said Edwin Morton Abbott, being justly and truly indebted unto *the said parties hereto of the third part* in the several sums set opposite to their respective names in the schedule hereto, which he is unable to pay in full, has therefore proposed and agreed to assign all his estate and effects unto the said trustee, *for the benefit of his creditors as hereinafter mentioned:* Now, this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the premises, and of 5*s.*, &c., the said Edwin Morton Abbott doth by these presents grant, bargain, sell, assign, transfer, release, and set over unto the said trustee, his executors, administrators, and assigns, all and every the stock in trade, goods, wares, merchandises, household furniture, fixtures, plate, linen, china, books of account, debts, sum and sums of money, and all securities for money, vouchers, and other documents and writings, and all other the real and personal estate and effects whatsoever and wheresoever of him the said Edwin Morton Abbott, in possession, reversion, remainder, or expectancy, together with full and free possession, right and title of entry in and to all and every of the messuages or tenements and premises wherein the said several effects now are, To have and to hold the said stock in trade and all other the estate, effects, and premises hereby assigned, or intended so to be, unto the said trustee, his executors, administrators, and assigns, absolutely; upon trust, nevertheless, to collect and receive or sell and dispose of the said hereby-assigned premises, and every part thereof, either by public sale or private contract, and in one or more lot or lots, with liberty to give any credit for the same, or to take any security for the purchase-money or any part thereof, as to the said trustee, his executors or adminis-

trators, *shall seem proper; and upon trust, out of the moneys [*509
to be received by virtue of these presents, to pay all the costs and expenses of proposing, preparing, and executing these presents, and attending or relating to the said hereby-assigned premises or the trusts hereby created, and in the next place, *to pay, retain, and satisfy, rateably and proportionably, and without any preference or priority, to himself the said trustee and partners, and the other persons parties hereto of the third part who shall execute these presents within three months from the date hereof, the several debts or sums set opposite to their respective names in the said schedule hereto,* subject to the covenant hereinafter contained for verifying the amounts thereof; and to pay the residue, if any, of the said moneys unto the said Edwin Morton Abbott, his executors, administrators, and assigns: *Provided, nevertheless, that such creditors of the said Edwin Morton Abbott as shall not execute or assent in writing to take the benefit of these presents on or before the 1st day of May next, or within such further time, not exceeding thirty days, as the said trustee shall by writing under his hand and seal declare, shall be excluded from all benefit under these presents:* Provided always that it shall be lawful for the said trustee to make to the said Edwin Morton Abbott such allowance, or return to him such part of his household furniture or effects, not exceeding the value of 75*l.*, as the said trustee may deem expedient; and also to employ the said Edwin Morton Abbott, or any other person or persons, in winding up the affairs of him the said Edwin Morton Abbott, and in collecting and getting in his estate and effects hereby assigned, and to allow to the said Edwin Morton Abbott, or any other person or persons so employed as aforesaid, out of the said trust estate such sum and sums as to the said trustee shall seem proper: And *the said Edwin Morton Abbott doth hereby [*510
make, constitute, and appoint the said trustee, his executors and administrators, to be his true and lawful attorney, to ask, demand, sue for, recover, and receive all debts and sums of money owing to him the said Edwin Morton Abbott, and all other the premises hereby assigned, or intended so to be, and, on payment or delivery thereof, or of any part thereof respectively, to sign, seal, and execute receipts, acquittances, or other discharges for the same respectively, and, on non-payment or non-delivery thereof respectively, to commence and prosecute any action, suit, or other proceedings whatsoever for recovering and compelling the delivery or payment thereof respectively, and also to adjust, liquidate, and finally settle all accounts, dealings, and transactions whatsoever relating to the the said trust-estate and premises, and for all or any of the purposes aforesaid to use the name of the said Edwin Morton Abbott, his executors or administrators; and whatsoever the said attorney shall lawfully do or cause to be done in the premises, the said Edwin Morton Abbott doth hereby, for himself, his heirs, executors, and administrators, covenant with the said trustee, his executors, administrators, and assigns, to allow, ratify and confirm: Provided always, and it is hereby agreed and declared, that every receipt of the said trustee for the time being for any money payable to him by virtue of these presents shall effectually discharge the persons paying the same from being obliged to see to the application thereof, or from being answerable or accountable for the misapplication or non-application thereof: Provided

also, and it is hereby further covenanted and agreed by and between the said several parties hereto, that it shall be lawful for the said trustee, at the expense of the said trust-estate, to require the amount of any debt or debts of any or either of the several creditors *511] *parties hereto to be verified by solemn declaration or in such other manner as to the said trustee shall seem expedient, and, in the event of any such creditor or creditors refusing or failing so to verify his, her, or their debt or debts, then such creditor or creditors so refusing or failing as aforesaid shall lose all benefit, dividends, and advantages to be derived from or otherwise claimed under these presents, anything herein contained to the contrary notwithstanding; and thereupon the said trustee is hereby authorized and empowered to pay such last-mentioned dividends or dividend unto the said Edwin Morton Abbott: And the said trustee is authorized and empowered to pay or make such arrangements with the creditors whose debts are under 20*l.* as the said trustee may deem expedient: Provided also, and it is hereby declared and agreed, that any resolution signed by the majority in number and value of the creditors parties hereto shall be binding on all the several parties hereto, and shall be effectual for the allowance and passing of the accounts of the said trustee, and for discharging him from the trusts hereof, and from all claims and demands in respect thereof; and that all questions relating to the said trust-estate shall be decided according to English bankrupt law; and, further, that no trustee for the time being under these presents shall be answerable for the acts or receipts of each other, or for any loss or damage which may happen in the execution of the aforesaid trusts without their own respective wilful defaults; and, that, whenever the funds arising from the said trust-estate shall amount to 25*l.* or upwards, the same shall be paid to some bankers in the city of London, in the name of the said trustee, and the checks or orders for drawing out the said money or any part thereof shall be signed *512] by him: And this indenture lastly witnesseth, that, in *consideration of the premises, and of the assignment hereinbefore contained, the said several creditors parties hereto of the second and third parts, subject to the proviso next hereinafter contained, do, and each of them doth, acquit, release, and for ever discharge the said Edwin Morton Abbott of and from all manner of debt and debts, sum and sums of money, bills, bonds, notes, accounts, reckonings, judgments, executions, actions, suits, claims and demands whatsoever, which they the said releasing parties, or any or either of them, their or any or either of their partner or partners, now have or hereafter may have against the said Edwin Morton Abbott, his executors or administrators, for or in respect of any debt, transaction, matter, or thing up to the day of the date hereof: Provided always, and it is hereby expressly declared and agreed, that, in case the said Edwin Morton Abbott hath concealed or kept back any part of his estate and effects to the value of 50*l.* (except the linen and wearing apparel and other personal effects of him and his family), then the release hereinbefore contained shall be void and of no effect: Provided always that it shall be lawful for the said trustee hereby appointed to nominate as another and additional trustee of these presents any creditor of the said Edwin Morton Abbott selected or nominated by

or at any meeting of his creditors by any resolution of such meeting, and thereupon all the estate and effects of the said Edwin Morton Abbott hereby assigned shall and may by some deed or deeds, to be executed by the said trustee hereby appointed, be assigned so as to vest all the said estate and effects in the additional trustee jointly with the said trustee hereby appointed, and thenceforth the same shall be held by the said trustees upon the same trusts in all respects as are hereby declared, or such of them as shall be then *subsisting or capable of taking effect. In witness," &c.: [*513 Averment, that, before the commencement of this suit, to wit, at the time of making the said deed, the same was duly signed, sealed, and delivered by the defendant, the said trustee, and divers of the said creditors; and that, within twenty-eight days from the day of the execution of the said deed by the defendant, and before the commencement of this suit, a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards duly in writing assented to and approved of the said deed within the true intent and meaning of the said clauses of the said Act of Parliament; and that the execution of the said deed by the defendant was duly attested by a solicitor; and that, within twenty-eight days from the day of the execution thereof by the defendant, and before the commencement of this suit, the said deed was produced and left, having been first duly stamped, at the office of the Chief Registrar of the Court of Bankruptcy in London, for the purpose of being, and the same then was, duly registered; and that, together with the said deed, was delivered to the said chief registrar an affidavit by the defendant, as required by and according to the said Act; and that, immediately on the execution of the said deed by the defendant, possession of all the property comprised therein of which the defendant could give or order possession was given to the said trustee: That he, the defendant, did not conceal or keep back any part of his estate or effects to the value of 50*l.*, except the linen and wearing apparel of him and his family; and that the said deed always has been and is a trust deed for the benefit of the defendant's creditors, within the meaning of the said provisions of the said Act; and that the plaintiff was, at the time of the making of the said deed, *and before and at the time of the date [*514 thereof, a creditor of the defendant in respect of the causes of action in the declaration mentioned, within the meaning of the provisions of the said Act; and that the debts in the declaration mentioned then were debts due from the defendant to the plaintiff within the meaning of the said deed: And that, before the commencement of this suit, all things had happened and times elapsed necessary to render the said deed obligatory on the plaintiff, and to entitle the defendant to plead it in bar of this action; and that, by reason of the premises, and by force of the statute, the said deed,—the same having been at all times since the making and executing the same and being still in force,—became and was and is as effectual and obligatory in all respects on the plaintiff as if he had duly signed and executed the same; and that, by reason of the premises, the defendant, before the commencement of this suit, became and was released and dis-

charged in manner aforesaid from the said causes of action in the declaration mentioned.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that the deed set forth and allegations in the plea show no defence to the action." Joinder.

Denman, Q. C. (with whom was *Willoughby*), in support of the demurrer.—The deed set out in the plea was clearly bad under the old law, for excluding those creditors who do not execute it. That it would have been void under the 12 & 13 Vict. c. 106, s. 224, is clear from Legg v. Cheesebrough, 5 C. B. N. S. 74, (E. C. L. R. vol. 94), (where nearly all the earlier cases are collected), Leonard v. Sheard, 28 Law J., Q. B. 183. [WILLES, J. —And Dunlop v. Crüger, in the Exchequer Chamber, 32 Law J., Exch. 42.] It is equally bad under the 192d *section *515] of the 24 & 25 Vict. c. 134, which enacts that "every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had fully executed the same, provided the following conditions be observed, that is to say,—1. A majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to 10*l.* and upwards shall, before or after the execution thereof by the debtor, in writing, assent to or approve of such deed or instrument,—2. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same,—3. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor,—4. Within twenty-eight days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been first duly stamped) at the office of the chief registrar, for the purpose of being registered,—5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number representing three-fourths in value of the creditors of the debtor whose debts amount to 10*l.* or upwards have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed,—6. Such deed or instrument shall before regis- *516] tration bear such ordinary and ad valorem *stamp-duties as are hereinafter provided,—7. Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees." This section came under the consideration of the Court of Exchequer in Walter v. Adcock, 7 Hurlst. & N. 541,† and that Court held that a deed made between a debtor and a majority in number representing three-fourths in value of his *trade*-creditors whose debts respectively amount to 10*l.* and upwards, whereby the debtor covenants to pay a composition on a certain day, and in consideration thereof the creditors release him, is not binding on the creditors who

do not execute it. Bramwell, B., there says: "The 192d section says 'every deed or instrument made or entered into between a debtor and his creditors.' That means *all* his creditors: but the section proceeds, 'or any of them.' That cannot mean any of them to the exclusion of the rest, because it would follow that a debtor might enter into an arrangement with some of his creditors by which the others would be bound though they received no benefit. In my opinion 'any of them' means, as trustees for the rest, that is, not on the behalf of any of them, but on behalf of the whole. The section proceeds, 'relating to the debts or liabilities of the debtor,' that is, to *all* his debts, 'his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same.' That applies only to deeds which comprehend all the creditors, and might be consistently executed by all. In fact, it means a deed for the benefit of all the creditors. It is impossible to suppose that the legislature meant that a debtor might enter into a deed of *arrangement with some of his creditors to the exclusion of all the rest, and yet bind them." [*517

In Ex parte Rawlings, 32 Law J., Bankruptcy, 27, it was likewise held by the Lords Justices that the words "between a debtor and his creditors" in the 192d section, refer to all the creditors, and not some of them only; Lord Justice Turner saying,—"I agree in the opinion expressed by one of the learned Barons of the Court of Exchequer, that, in order to bring a case within the section, the composition must be with all the creditors. I read the section thus: 'Every deed or instrument relating to the debts and liabilities of the debtor, and relating also to his release therefrom, or to the distribution, inspection, management, and winding up of his estate, or to any of such matters, shall be valid and effectual under the proviso which is mentioned in the section:' in effect, that the deed must relate to the debts and liabilities, and to some one or more of the other specified matters; and I think that the words 'debts' and 'liabilities,' as used in the section thus read, must be taken to relate to *all* the debts and liabilities; for, not only is this, as I conceive, the ordinary meaning of the words, but it is scarcely possible to suppose that the legislature could intend that all the creditors should be bound by an arrangement which was partial, and confined in its operation to some of them only." The same construction was adopted by the same learned Judges in Ex parte Godden, In re Shettle, 32 Law J., Bankruptcy, 37. And in Ex parte Morgan, In re Woodhouse, 32 Law J., Bankruptcy, 15, Lord Westbury, C., held that the 192d section is applicable only to deeds which contain provisions for the benefit of *all* the creditors; and therefore a trust-deed for the benefit of those creditors only who shall execute the same within twenty-eight days, is not within that section, and cannot be registered *except under s. 194; and dissenting creditors are entitled to treat such a deed as an act of bankruptcy. In giving judgment, his Lordship said: "I regret to see the variety of determinations, not consistent with each other, which have taken place upon the 192d section. I think it must be perfectly clear to any person who will examine that section, that it was intended to be applicable only to deeds which contain provisions for the benefit of all the cre- [*518

ditors. I entirely agree with that determination which has decided, that, if a trust-deed excludes any creditor, or a deed of composition excludes any creditor, such a deed is not entitled to the benefit of the provisions contained in the 192d section."

Mellish, Q. C., admitted that he was unable to distinguish the present case from those referred to, and especially that of Ex parte Morgan, In re Woodhouse, 32 Law J., Bankruptcy, 15.

WILLIAMS, J.—I am of opinion that the present case is not to be distinguished from the cases of Ex parte Morgan, In re Woodhouse, before the Lord Chancellor, and Ex parte Rawlings, and Ex parte Godden, before the Lords Justices; and by those decisions we must be guided. Upon that point, therefore, without going any further, I am of opinion that the plaintiff must have judgment.

WILLES, J., and KEATING, J., concurring,

Judgment for the plaintiff.

*519] *HEYMAN v. FLEWKER. *Feb.* 24.

Pictures were deposited by the defendant with one I. (whose ordinary business was that of an agent for procuring business for two insurance offices in Liverpool), with instructions then or subsequently given to sell them for him for a certain commission:—Held, that I. was an "agent intrusted with the possession of goods" within the meaning of the Factors Act, 5 & 6 Vict. c. 39, and consequently that the defendant was bound by a contract of pledge bonâ fide made with him.

THIS was an action for the alleged conversion of certain pictures. The defendant pleaded not guilty.

The cause was tried before Willes, J., at the last Summer Assizes at Liverpool. The facts which appeared in evidence were as follows:—The defendant, being about to change his place of residence, placed certain pictures in the hands of one Inman, and instructed him to sell five of them, for which service he was to receive a commission. It did not appear whether the instructions to sell the five pictures were given at the time of the original deposit, or subsequently. Inman's usual business was that of agent to certain insurance offices; and he had occasionally performed other services for commission; but it was no part of his ordinary business to sell goods on commission. Inman, without any authority from the defendant, pledged the pictures in question with the plaintiff, who was a pawnbroker in Liverpool, for 20*l.* 17*s.* There was no evidence that the plaintiff was aware that Inman was acting fraudulently in the matter; and, so far as he was concerned, the transaction was a bonâ fide one. Inman was subsequently tried before the Recorder of Liverpool, under the Bailee Act (20 & 21 Vict. c. 54, s. 4), and convicted. The defendant applied to the Recorder to order the pictures to be delivered up to him. The Recorder, however, declined to accede to his request: but the defendant ultimately prevailed upon the police, in whose custody the pictures were, to hand them over to him; and, on his refusal, upon due demand, to give them up to the plaintiff, this action was brought.

*520] *It was insisted on the part of the plaintiff that Inman was an "agent" intrusted with the possession of goods, within the

meaning of the Factors Act, 5 & 6 Vict. c. 39, s. 1, and therefore capable of giving a title to a bonâ fide pawnee.

For the defendant it was submitted that the "agent" meant by the Factors Act, was, a *mercantile* agent,—one whose ordinary business it was to sell goods, wares, and merchandises on commission, and that an isolated transaction like that in question did not constitute a man an agent in that sense.

The learned Judge directed the jury to find for the defendant, reserving leave to the plaintiff to move to enter a verdict for 20*l.* 17*s.*, if the Court should be of opinion that Inman was an agent within the meaning of the Factors Act.

Brett, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly.

Aspinall and *Crompton Hutton*, in Hilary Term, showed cause.—The question turns upon the construction of the 1st section of the Factors Act, 5 & 6 Vict. c. 39, which enacts that "any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security, bonâ fide made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods and all other persons interested therein, notwithstanding the *person claiming such [*521
pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." It was proved here that it was not the ordinary business of Inman to sell goods on commission: he was not a commission agent in the mercantile sense. The title and the recitals of the Factors Act show that it was intended to be confined to mercantile transactions. In Monk *v.* Whittenbury, 2 B. & Ad. 484 (E. C. L. R. vol. 22), a wharfinger having received flour in that capacity, and without any authority to sell, disposed of it to a purchaser who had no notice of a want of authority. The wharfinger was in the habit of doing the business of a flour factor: and it was held, that, nevertheless the Act 6 G. 4, c. 94, s. 4, which protected purchases made innocently and in the ordinary course of business from agents intrusted with goods, did not apply to this case; the wharfinger not being an agent within the meaning of the statute. Lord Tenterden there said: "It is difficult to say precisely what is meant in this section by an 'agent intrusted with goods:' but we are clearly of opinion that a wharfinger is not such a person. If a wharfinger were so considered, it would be impossible to say that a carter, a warehouseman, or a packer may not: and, although it is true that Crane transacted business as a factor with some persons, we do not think that can avail the plaintiff in the present case." [WILLES, J.—The same construction was put upon the 5 & 6 Vict. c. 39, in Lamb *v.* Attenborough, 31 Law J., Q. B. 41, 1 Smith & B. 831. There, it was held that a clerk to a wine merchant who was authorized by his employer to sign delivery orders per procuration, and who by doing so obtained possession of dock-warrants relating to goods belonging

to his master, and afterwards obtained an advance of money upon the security of such dock-warrants, was not an agent *intrusted *522] with the possession of the documents of title to goods within the meaning of the 5 & 6 Vict. c. 39, so as to give validity to the contract, and his employer might recover possession of such dock-warrants from the person with whom they were pledged, though the advance was made bonâ fide. My Brother Crompton there says: "The relationship between the plaintiff and Bryant was that of master and servant, not that of principal and agent, as contemplated by the statute." And my Brother Blackburn says: "The agent contemplated by the statute is, an agent having a mercantile possession, so as to be within the mercantile usage of getting advances made. In this case, Bryant's possession was that of servant, not of agent."] A similar construction is put upon the Act by the Vice-Chancellor, in Wood v. Rowcliffe, 6 Hare 183, 191, viz. that it applies to mercantile transactions, and not to the case of advances made upon the security of furniture used in a furnished house,—not in the way of trade,—to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent intrusted with the custody of the furniture by the true owner. "It may be true," said his honour, "that the words of the statute, in their general signification, are wide enough to comprehend the present case. But the Act has never been understood to apply to other than mercantile transactions. The first Act (6 G. 4, c. 94) is for the 'protection of the property of merchants and others,' and the property referred to is 'goods, wares, and merchandises' intrusted to the agent 'for the purpose of consignment or sale,' or 'shipped.' And, upon a judicial construction of the Act, it has been held that the generality of the expressions must be restricted. Every servant of the owner of goods employed in the care or carriage of such goods, is, in one sense, an 'agent intrusted with goods,' but *still he is not an agent within the meaning of the statute: *523] Monk v. Whittenbury, 2 B. & Ad. 484 (E. C. L. R. vol. 22). The title of the second Act (5 & 6 Vict. c. 39) is more general: but it appears to me to relate to 'agents,' and to 'goods and merchandise,' in a sense which is not applicable to the agency or the property in this case." All the expressions in the Act tend to show that it has reference to mercantile transactions only. And the authority to sell makes no difference.

Brett, Q. C., in support of the rule.—The words of the Factors Act are to be read in their ordinary and accustomed sense; and, so reading them, it is impossible to hold that the transaction in question is not within it. Even if the word "mercantile" be introduced into the Act, as suggested on the other side, what is there to negative this being a commercial dealing? Inman was employed to sell the pictures on commission. Assuming this to have been the first occasion on which he was so employed, how does that prevent his being "an agent intrusted with the possession of goods," within this enactment? All that was decided in Lamb v. Attenborough, 31 Law J., Q. B. 41, 1 Best & Smith 831 (E. C. L. R. vol. 101), is, that there is a well-known distinction between the relation of principal and agent and that of master and servant, and that a clerk who holds dock-warrants for his master is not intrusted therewith as "agent" within the meaning of

the Act. Besides, there, the party was not *intrusted* with the documents at all, but had improperly obtained them by means of other documents with which he *was* intrusted. And with regard to the case of Wood *v.* Rowcliffe, 6 Hare 191, all that was *decided* was, that the mere leaving a woman in possession of household furniture in a house did not constitute her an agent for the purposes of this Act. The nature of the goods with *which the party is intrusted can make no difference. Besides, pictures are very commonly [*524 sold on commission. The number or value of the articles sold or deposited for sale cannot determine the mercantile character of the transaction: nor can it be an objection that the transaction in question is the first the party was engaged in. There is no reason why the meaning of "agent" should be limited in the way suggested. [WILLES, J.—It is a little ambiguous upon my note, whether Inman had the pictures originally deposited with him for sale or not. In one part I find it states that the defendant "afterwards resolved to sell." I do not, however, think that makes any substantial difference.]

Cur. adv. vult.

WILLES, J., now delivered the judgment of the Court:—

This case turned upon the true construction of the Factors Act, 5 & 6 Vict. c. 39, s. 1, which, after reciting that, "by the 6 G. 4, c. 94, validity is given, under certain circumstances, to contracts or agreements made with persons intrusted with and in possession of the documents of title to goods and merchandise, and consignees making advances to persons abroad who are intrusted with any goods and merchandises are entitled, under certain circumstances, to a lien thereon, but under the said Act and the present state of the law advances cannot safely be made upon goods or documents to persons known to have possession thereof as agents only," and reciting the 4th section of the 6 G. 4, c. 94, and further reciting that "advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same *protection and validity should be extended to bonâ fide advances upon goods and merchandise as by the said [*525 recited Act is given to sales, and that owners intrusting agents with the possession of goods and merchandise or of documents of title thereto, should in all cases where such owners by the said recited Act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances bonâ fide made on the like security; and that much litigation has arisen on the construction of the said recited Act, and the same does not extend to protect exchanges of securities bonâ fide made; and so much uncertainty exists in respect thereof that it is expedient to alter and amend the same, and to extend the provisions thereof, and to put the law on a clear and certain basis,"—enacts in s. 1 that "any agent who shall thereafter be intrusted with the possession of goods, or the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security, bonâ fide made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made

upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent."

The defendant, being about to remove, intrusted some pictures to Inman to keep for him, and either then or afterwards employed him
*526] to sell them for him *upon commission, under which employment Inman continued to hold them. It was not Inman's ordinary business to sell goods on commission. He was agent for two insurance offices, to obtain business for them on commission, and occasionally performed other services for commission: but the employment of him to sell the pictures was an isolated one, not in the course of any business carried on by him. Inman, in fraud of the defendant, pledged five of the pictures to the plaintiff, who, so far as appeared, knew nothing of the fraud, and advanced upon them 20*l.* 17*s.* The defendant retook these pictures under circumstances equivalent to a taking out of the possession of the plaintiff; for which retaking this action was brought. At the trial, the defendant had a verdict, subject to leave to enter the verdict for the plaintiff for the sum advanced, if in the opinion of the Court his advance was within the protection of the Factors Act.

The case was argued last term, and we took time to consider our judgment, which I now proceed to deliver.

It cannot be denied that Inman was in fact an agent intrusted with goods for sale; and the only ground upon which it could be contended that the Factors Act was inapplicable, was, that this was an isolated employment as such agent, and not in the course of any business of selling upon commission carried on by him. To sustain this argument, reference was made to the recital of the statute, that, "advances upon goods and merchandise have been an usual and ordinary course of business;" and it was contended that the Act must be limited in construction to cases in which the particular advance to be protected was made to a person taking it in the course of a business carried on by him. Even assuming, however, that the preamble of the Act
*527] could be referred to in *order to restrain the construction of the enacting part, which would be against the general rule, we see no sufficient reason for limiting the general language of the Act, "usual and ordinary course of business," by construction, to business usually carried on by the defaulting agent. We think it enough, to bring a case within the Act, that the character of the employment in the particular instance is the same as that of others who do carry on business generally, and are as to each and all who employ them unquestionably agents within the Act. It may be that this is a hard case: but individual interests are professedly sacrificed by the Factors Act to general convenience. The hardship seems even greater if a regularly established salesman is employed, in whom confidence would ordinarly be felt; and yet such an agent must be admitted to be within the statute. Assuming the case of ten persons who on ten successive days put their property for sale upon commission into the hands of another, who thereupon should think it worth his while to

set up as a commission-agent, it would not be easy to suggest any sound distinction between the cases of the first and last employer, or between the case of either of them and that of the first customer who arrived after the words "commission-agent" had been put up over his door.

Many decisions upon the construction of the statute were referred to, with none of which does our decision clash: to which may be added the recent case of Sheppard *v.* The Union Bank of London, 7 Hurlst. & N. 661.† All that these cases decide applicable to the present purpose may be stated thus,—that the term "agent" does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party; but only persons whose employment *corresponds to that of some known kind of commercial agent, like [*528 that class (factors) from which the Act has taken its name. The employment of Inman did strictly correspond, though in a small way, to that of a factor, because the defendant did not merely intrust him with the possession of the goods for safe custody, but employed him to sell the goods so intrusted to him upon commission. The goods were therefore in his possession as in that of an agent within the statute, and Mr. *Brett* is entitled to have his rule made absolute to enter the verdict for the plaintiff. Rule absolute.

HARRISON and Another, Executors of R. J. R. CAMPBELL, deceased, *v.* LAY. *Feb.* 12.

By bond of submission dated the 19th of March, 1859, it was referred to an arbitrator to determine of and concerning all matters of accounts then pending between A. and B. The arbitrator, by his award, reciting the submission, awarded "of and concerning the premises," that, "up to the 31st of October, 1857, the accounts, between A. and B., in reference to the Wouldham Court Farm, were adjusted, and that the balance then due from A. to B. amounted to 4314*l.* 14*s.* 10*d.*; *and that no partnership existed between A. and B. in respect of the said Wouldham Court Farm*:" and he further awarded "that A. do pay to B. the sum of 781*l.* 5*s.* 3*d.*, the amount due from him in respect of the Wouldham Court Farm aforesaid; and that the said A. do pay to the said B. the sum of 1137*l.* 17*s.* due from him to B. in respect of shares in the Wouldham Cement Company, *and that, on payment of such last-mentioned sum, the said B. do deliver to the said A.* 118 *shares in the said Wouldham Cement Company held by him as collateral security for the said sum.*"

In an action brought by the executors of B. to enforce payment of the two sums so awarded,—Held, that the award was not uncertain, and that the arbitrator had not exceeded the authority given to him by the submission, in awarding that no partnership existed between A. and B., or that the shares held by B. as collateral security for the 1137*l.* 17*s.* should be delivered up to A. on payment of that sum.

THIS was an action upon a bond for 2000*l.* given by the defendant to the testator in his lifetime, on the 19th of March, 1859.

Plea,—that the said writing obligatory was and is subject to a certain condition, which was and is to the *tenor following, [*529 that is to say,—"Whereas, differences have arisen and are subsisting between the above-bounden M. J. Lay and the above-named R. J. R. Campbell, and there are divers accounts now subsisting and unsettled between them the said M. J. Lay and R. J. R. Campbell: And whereas, it has been agreed, that, immediately upon the execution of the above-written bond or obligation, all such differences and

disputes as aforesaid and such unsettled accounts as aforesaid shall be referred to the hearing, arbitrament, and determination of John Yates, of, &c.: Now, the condition of the above-written bond or obligation is such, that, if the above-bounden M. J. Lay, his heirs, executors, and administrators, on his and their part and behalf should in all things well and truly obey, abide by, and perform the award, order, arbitrament, judgment, and final determination of the said John Yates, indifferently elected and named as well on the part and behalf of the above-bounden M. J. Lay as of the above-named R. J. R. Campbell, to award, order, arbitrate, judge, and determine *of and concerning all matters of accounts now pending between the said M. J. Lay and R. J. R. Campbell*, so as the said award be made in writing under the hand of the said John Yates and ready to be delivered to the said parties in difference, or their respective executors or administrators, as shall desire the same, on or before the 16th of April next, or such other time as the said arbitrator may from time to time appoint, then the above-written bond or obligation shall be void and of no effect: And the said M. J. Lay and R. J. R. Campbell do hereby agree that this submission shall or may be made an order or rule of Her Majesty's Court of Queen's Bench at Westminster at the instance of either of the said M. J. Lay and R. J. R. Campbell, his executors or administrators, and that the said arbitrator shall, for the purpose of
*530] *enabling him to make the said award, be at liberty to go into parol as well as written evidence, and to examine the said parties in difference, or either or any or one of them, and such other witnesses as he shall think proper, on oath:" Averment, that the defendant performed, fulfilled, and observed all the matters and things in the said condition mentioned on his part to be performed, fulfilled, and observed, according to the said condition.

The plaintiffs replied that the said John Yates, the arbitrator in the said condition of the said writing obligatory mentioned, after the making of the said writing obligatory, and within the times limited by the said condition for the making of his award of and concerning the premises, having taken upon himself the burthen of the said arbitrament, did, in the lifetime of the said R. J. R. Campbell, and in due manner, make his award of and concerning the premises in the said condition mentioned and thereby referred to him, ready to be delivered to the said parties in difference, or such of them as should require the same; by which said award the said John Yates did then award and order in the words and figures following, that is to say,—"To all to whom these presents shall come, I, John Yates, of, &c., send greeting: Whereas, on the 19th of March, 1849, by a bond made and sealed with the seal of M. J. Lay, of Wouldham in the County of Kent, Esquire, he became held and firmly bound unto R. J. R. Campbell, of No. 62, Moorgate Street, in the city of London, merchant, in the penal sum of 2000*l.*: And whereas, on the day and year aforesaid, the said R. J. R. Campbell, by another bond, sealed with his seal, became held and firmly bound unto the said M. J. Lay, in the like penal sum, with conditions written under the said several bonds that the said M.
*531] J. Lay, his heirs, executors, and *administrators, and the said R. J. R. Campbell, his heirs, executors, and administrators, should in all things well and truly obey, abide by, and perform the

award, order, arbitrament, judgment, and final determination of me John Yates, indifferently elected and named as well on the part and behalf of the above-bounden M. J. Lay as the above-bounden R. J. R. Campbell *to award, order, arbitrate, judge, and determine of and concerning all matters of accounts then pending between the said M. J. Lay and R. J. R. Campbell*, so as the said award should be made in writing under the hand of me the said John Yates, and ready to be delivered to the said parties in difference, or their respective executors or administrators, as should desire the same, on the 16th of April then next, or such other time as I the said arbitrator might from time to time appoint; and that that submission might be made an order or rule of Her Majesty's Court of Queen's Bench at Westminster at the instance of either of the said M. J. Lay and R. J. R. Campbell, his executors or administrators: And whereas I the said John Yates did by eleven several endorsements on the said order, by writing under my hand, enlarge the time for making my said award until the 30th of July instant: Now, I the said John Yates, having taken upon myself the burthen of the said arbitration, and having heard and duly and maturely weighed and considered the several allegations, vouchers, and proofs in difference respectively, do, in pursuance of the said submission, make and publish this my award *of and concerning the said premises*, in manner following, that is to say, I do award, that, up to the 31st of October, 1857, the accounts between the said M. J. Lay and R. J. R. Campbell in reference to the Wouldham Court Farm, situate in the county of Kent, were adjusted, and that the balance then due from the said M. J. Lay to the said *R. J. R. Campbell [*532 amounted to the sum of 4314*l.* 14*s.* 10*d.*: And I further award *that no partnership existed between the said M. J. Lay and R. J. R. Campbell in respect of the said Wouldham Court Farm*, and that the said farm was carried on by the said M. J. Lay for his own sole use and benefit: And I further award that the said M. J. Lay do pay to the said R. J. R. Campbell the sum of 781*l.* 5*s.* 3*d.*, the amount due from him in respect of the Wouldham Court Farm aforesaid: And I further award that the said M. J. Lay do pay to the said R. J. R. Campbell the sum of 1137*l.* 17*s.*, due from him to the said R. J. R. Campbell in respect of shares in the Wouldham Cement Company (Limited), and that, on payment of such last-mentioned sum, the said R. J. R. Campbell do deliver to the said M. J. Lay the 118 shares in the said Wouldham Cement Company (Limited) held by him as collateral security for the said sum: And lastly I award that the costs of this award shall be borne and paid by the said M. J. Lay, which said costs of the said award I do assess at the sum of 26*l.* 5*s.* In witness, &c., this 5th day of July, 1860,"—of which said award the defendant afterwards and in the lifetime of the said R. J. R. Campbell had notice: Breach, that the defendant had not paid the said sum of 781*l.* 5*s.* 3*d.*, or any part thereof, or the said sum of 1137*l.* 17*s.*, or any part thereof, although all things had been done and happened, and all times had elapsed necessary to entitle the plaintiffs to maintain this action.

The defendant demurred to this replication, the grounds of demurrer stated in the margin being, "that the award appears on the face of it

not to be a final one of the matters submitted to arbitration, and that it awards as to matters not submitted." Joinder.

*533] *J. Brown*, in support of the demurrer.(a)—The award is bad on the face of it. The bond is dated the 19th of March, 1859: and the award does not show how or when the 4314*l.* 14*s.* 10*d.*, which it finds was due to the testator up to the 31st of October, 1857, became reduced to 781*l.* 5*s.* 3*d.* [WILLIAMS, J.—The arbitrator professes to make his award de præmissis.] Under the submission, the arbitrator had no authority to deal with the shares in the Wouldham Cement Company, and yet the payment of the 1137*l.* 17*s.* is made the condition on which those shares are to be delivered up by Campbell. If the defendant were to bring an action against Campbell's executors for not giving up those shares, he could derive no advantage from that part of the award: and this condition cannot be rejected. All the authorities are collected in the notes to Pope *v.* Brett, 2 Wms. Saund. 292. In the principal case it was held that an award that A. shall be paid by B. money due for task-work, and then A. should pay 25*l.* to B., and that the parties should give each other a general release, is void in the whole, for the uncertainty what sum should be paid for

*534] task-work. The learned *editor, after referring to Fox *v.* Smith, 2 Wils. 267, Addison *v.* Gray, 2 Wils. 293, Bargrave *v.* Atkins, 3 Lev. 413, and Pinkney *v.* Bullock, Easter 23 Car. 2, observes,—"However, these cases differ from the present; and there seems to be no doubt that the principle of the resolution in the principal case is well founded, namely, that, if by the nullity of the award in any part, one of the parties cannot have the advantage intended him as a recompense or consideration for that which he is to do to the other, the award is void in the whole: 1 Rol. Abr. 259, pl. 9, 10; see Birks *v.* Trippet, 1 Saund. 32; Veale *v.* Warner, 1 Saund. 324, n. (2); Hodsden *v.* Harridge, 2 Saund. 61; Coppin *v.* Hurnard, 2 Saund. 127. See also accord. Auriol *v.* Smith, 1 Turn. & Russ. 128; Bowes *v.* Fernie, 4 Mylne & Cr. 150; Jackson *v.* Clarke, McClell. & Y. 200;† Tomlin *v.* Mayor of Fordwich, 5 Ad. & E. 147 (E. C. L. R. vol. 31), 6 N. & M. 594 (E. C. L. R. vol. 36); Price *v.* Popkin, 10 Ad. & E. 139 (E. C. L. R. vol. 37), 2 P. & D. 304; In re Tandy, 4 Dowl. P. C. 1044; In re Marshall, 3 Q. B. 878 (E. C. L. R. vol. 43), 3 Gale & D. 253." Then, the arbitrator goes on to award that no partnership existed between Lay and Campbell in respect of the Wouldham Court Farm. What authority had he to award whether they were partners or not? [WILLIAMS, J., referred to Aitcheson *v.* Cargey, 2 Bingh. 199 (E. C. L. R. vol. 9), 9 J. B. Moore 381 (E. C. L. R. vol. 17), McClell. 367, 13 Price 639 (affirming Cargey *v.* Aitcheson, 2 B. & C. 170 (E. C. L. R. vol. 9), 3 D. & R. 433 (E. C. L. R. vol. 16)). There, the declaration

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the award is bad on the following grounds,—1. That it does not decide on all matters of accounts pending between the defendant and the testator at the date of the submission,—2. That it finds that a balance of 4314*l.* 14*s.* 10*d.* was due from the defendant to the testator up to the 31st of October, 1857, but does not find that it was due at the date of the award, and does not award payment of it.—3. That it does not award as to what is due on the accounts generally, though it awards certain sums to be due and to be paid in respect of particular transactions,—4. That it awards on matters beyond the arbitrator's authority,—5. That it awards that there was no partnership between the defendant and the testator in respect of the Wouldham Court Farm."

stated that the plaintiff and defendant, by articles of agreement,—reciting that several actions arising out of the same transaction had been brought, and defended by the plaintiff and defendant, G. A. and D. A., and that in one of them the assignees of one G. T., a bankrupt, recovered against the plaintiff 2500*l.*, and that disputes existed between the plaintiff and defendant respecting the value of the goods and stock which each had received from a certain farm, and their keep and feeding by the plaintiff, *and also concerning the proportion which each was to pay of the said sum of 2500*l.* according to an agreement entered into between them before the trial, and also concerning the costs of bringing and defending the actions above mentioned,—submitted themselves to the award of J. T., J. R., and T. C. respecting the said matters; that the arbitrators, taking the said matters into consideration, awarded that the defendant should pay the plaintiff 444*l.*; that five eighth parts of the costs of the several actions before mentioned should be paid by the plaintiff, and three-eighths by the defendant; that the sums already expended by either of them should be allowed as part payment of his proportion; and that, when the sum of 444*l.* and the costs, including those of the arbitration and award, were paid, mutual releases should be given. On demurrer, it was held that the plaintiff was entitled to recover the 444*l.*; for that, as to the first part of the award, nothing appeared on the declaration to show that the arbitrators had not awarded the sum of 444*l.* after having taken into consideration the value of the stock and goods; that it was sufficiently certain; and that, if the arbitrators had exceeded their authority as to costs, it was not sufficient to invalidate the award.] [*535

Hance, contrà, was not called upon.(*a*)

WILLIAMS, J.—I am of opinion that the plaintiffs *are entitled to judgment on this demurrer. The only question for us to consider is, whether this award is upon the face of it bad: and I see nothing that is at all inconsistent with the award being a perfectly good one. It appears from the recitals and the bond of submission that the arbitrator was to determine as to certain unsettled matters of account then pending between Lay and Campbell. Having recited his authority, the arbitrator by his award goes on to say, that, having heard and duly weighed and considered the several allegations, vouchers, and proofs in difference, he, in pursuance of the submission, makes and publishes his award *of and concerning the said premises*, in manner following. He, therefore, professes to make his award of and concerning the matters of account then pending between the parties. We must take it that the arbitrator has taken the accounts only up to the date he has referred to. It is then said that the arbitrator has exceeded his authority in two respects. In the first place, it is said that he had no power to award, that, on payment by Lay to Campbell of 1137*l.* 17*s.*, Campbell shall deliver up to Lay certain shares in the Wouldham Cement Company held by him as collateral [*536

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That there is nothing on the face of the award to show that the arbitrator has not, and everything to lead to the conclusion that he has, finally adjudicated on all the matters referred:

"2. That the matters, if any, not submitted to but adjudicated on by the arbitrator are clearly severable, and have not been made the subject of this action."

security for that sum. If the award had stopped at the direction respecting the payment of the money, there could be no doubt that it would have been a perfectly good award. Is it, then, rendered bad by the arbitrator going on to say, that, on payment of the money, the securities shall be delivered up? We have no right to speculate upon what was the nature of the accounts and securities the arbitrator had to deal with. All we have to inquire into, is, whether the award is bad upon the face of it,—whether the order to deliver up the shares vitiates the award. It may well be that the arbitrator had authority
*537] to treat the delivery up of the collateral securities *as a final settlement of the accounts. But, assuming this to be an excess of authority, it is not so blended with the award that a certain sum is due as to make the one act dependent upon the other. The money awarded is equally due whether the collateral security be delivered up or not. I therefore think, that, even if there was an excess of authority in this respect, the award would not be thereby rendered bad. Then it is said that the arbitrator has further exceeded the authority conferred upon him by the submission, by reason of his having awarded that no partnership existed between Lay and Campbell in respect of the Wouldham Court Farm. It seems to me, that, although it was unnecessary for the arbitrator to state upon the face of his award the ground upon which he arrived at the result he did as to the accounts between the parties, the fact of his having done so does not vitiate the award. Upon the whole, therefore, I am of opinion that the award is good upon the face of it, and consequently that our judgment should be for the plaintiffs.

WILLES, J., and KEATING, J., concurring,

Judgment for the plaintiffs.

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*538] *BRAMPTON v. BEDDOES. *Jan.* 16.

Upon a sale of the good-will of a drapery and hosiery business for 170*l.*, the vendor covenanted that he would not carry on or assist in the carrying on of a business such as that carried on upon the premises assigned, within two miles, under the forfeiture of 200*l.*, to be recovered as liquidated damages:—Held, that this covenant was broken by the vendor's supplying from a place beyond the prescribed limit, goods (to the amount of 150*l.*) to customers residing within the district, at their solicitation.

THIS was an action for the alleged breach of an agreement whereby the defendant agreed to sell to the plaintiff the lease of certain premises in Lupus Street, Pimlico, together with the good-will of his business of a linen-draper, haberdasher, and hosier, for the sum of 170*l.* The agreement contained a covenant on the part of the defendant that he would not *carry on* or assist in the carrying on of a business such as that then carried on at No. 17 Lupus street, Pimlico (the premises assigned), *within two miles* of that place, under the forfeiture of 200*l.*, to be recovered as and in the nature of liquidated damages.

The declaration set out the agreement, and averred that the defendant had, in breach thereof, carried on the business indicated within the prohibited distance. The defendant pleaded not guilty.

The cause was tried before Willes, J., at the sittings in London in Michaelmas Term last. It appeared that the defendant had bought certain hosiery and other goods with which he had intended to stock a shop he was about to take in Southwark (more than two miles from Lupus street), and which he had in a room he occupied in the neighbourhood of Manchester Square; that, having called upon some of his old customers in Pimlico for the purpose of collecting debts, he was solicited by them to continue to supply them with goods, the plaintiff declining to supply them upon credit; and that, yielding to their solicitations, he did sell hosiery and drapery to three or four of those persons, to the extent of about 150*l.* in all.

It was submitted for the plaintiff that this was a breach of the defendant's covenant: and, on the other *hand, it was contended that the mere casual supply of goods to three or four [*539 persons within the prohibited district, the defendant having no shop or place of business within the distance limited by the agreement, was not a "carrying on of business" so as to render the defendant liable to the penalty.

The learned Judge directed a verdict for the plaintiff for 200*l.*, reserving leave to the defendant to move to enter a verdict for him, if the Court should be of opinion that there was no breach.

Hawkins, Q. C., in Michaelmas Term, obtained a rule nisi accordingly.

Joyce now showed cause.—The substance of the defendant's contract is, that he will not interfere with the good-will of the business which he professes to sell to the plaintiff. The defendant has clearly been guilty of a breach of that contract by furnishing goods to several persons who for some reason perferred dealing with him to dealing at the shop. It will be suggested that there can be no breach of a covenant like this, unless the party has some shop or place of business within the protected district. That, however, is disposed of by the case of Turner *v.* Evans, 2 Ellis & B. 512 (E. C. L. R. vol. 75). That was an action on an agreement by which the defendant, a wine merchant at Carnarvon, sold to the plaintiffs his house and premises at Carnarvon, and his stock in trade, and also sold the good-will of his business, and, in consideration thereof, promised them not directly or indirectly to "set up, embark in, or carry on the business or trade of a wine merchant at Carnarvon, or at any other town or place within the three counties of Carnarvon, Anglesea, and Merioneth:" breach, that he had done so. On the trial, it was admitted, that, after the agreement, the defendant *commenced business [*540 as a wine merchant at a town not within the prohibited district, and from thence in many instances supplied wine to persons resident within the district, in pursuance of orders solicited by him within the district, but he had no residence, warehouse, or place of business within the district. It being left to the Court, as a mixed question of law and fact, to say whether this was a breach,—it was held that the defendant might carry on business within the district to such an extent as to be a breach of the contract, though he had neither place of business nor stores within the district. Lord Campbell says: "In ascertaining what the meaning of the contract is, I must look to the circumstances; and the language used is to be understood with reference

to those. I am not now to say what the phrase 'carrying on business at a place' may mean in the Excise Acts, or in other contracts; but to say what, in common sense, it means when used by one who sells the business of a wine merchant for a large sum of money, and promises that he will not directly nor indirectly carry on that business within a specified district. It cannot then be supposed to mean that he may, after selling the good-will of that business, do what he will within the district, provided he has no cellars or stores within it. If so, the intention of the parties might be completely defeated. The intention was, that the plaintiffs, who purchased the good-will of the defendant's business, should supply his customers. But, according to the defendant's construction, he might be in Carnarvon every day, solicit orders from every customer in the place, and supply them as before, except that the wine must be brought from a cellar outside the district; and thus he might effectually defraud the plaintiffs of the business which they bought and paid for. I think, however, that it *541] is not of the essence of the business of *a wine merchant to have a warehouse, cellar, or place of business at all: and, consequently, that there might in point of law be a breach of this contract by the defendant, without his having any of those." [The Court called upon.

Hawkins, Q. C., and *Rigby*, to support the rule.—The simple question is, whether there was evidence that the defendant had been guilty of a breach of his agreement, by "carrying on business" within the prohibited distance. What was proved was this, that, going round the neighbourhood of Lupus Street to collect debts which were due to him, some of his old customers told him they could not get what they wanted at the plaintiff's shop, and asked him to supply them, which, to the extent of four or five instances, amounting altogether to about 150*l*., he consented to do out of the remnant of stock accidentally left upon his hands. He did not go there to solicit orders; and his residence and the place where he kept his goods was considerably more than two miles from Lupus Street. Turner *v.* Evans, 2 Ellis & B. 512, is a totally different case. There, the evidence showed that the defendant had taken cellars in Chester, from whence in fifty instances he supplied wines to persons in Carnarvon and elsewhere within the three counties, in pursuance of orders solicited by him and his agents within the district. And Crompton, J., said,—"I think the question is one of fact. Was he (the defendant) doing this on system? for, he would not be carrying on business if he did it only now and then." Suppose the defendant had had a shop without the prescribed distance,—at Brighton, for instance,—and some of the persons he had been in the habit of supplying in Lupus Street chose to go to the new shop, would that be a breach of the agreement? No doubt, a man *542] may carry on business *in a given district without having a shop there. That was the point of law decided in Turner *v.* Evans. The sole question here is, whether the mere accidental dealings which were proved to have taken place amounted to such a carrying on of business as to constitute a breach of the defendant's contract.

ERLE, C. J.—I am of opinion that this rule must be discharged. That which the defendant did was a plain breach of his agreement

not to carry on the business of a linen-draper, haberdasher, or hosier within two miles of the premises in Lupus Street, Pimlico. The defendant sold his business to the plaintiff for 170*l.*, and bound himself not to carry on a similar business within the distance of two miles; and within a very short time he sold to customers within the district who had been in the habit of dealing at the shop goods to the amount of 150*l.*, because those customers could not obtain the accustomed credit from the new occupant. It is perfectly clear, that, to constitute such a dealing a breach of the agreement, it is not necessary that the defendant should have a shop or other place of business within the prescribed limit. It would entirely destroy the value of the good-will he sold, if the defendant could bring his goods within the district, and so prevent the customers from going to the defendant's shop. It is said that a mere casual sale of goods will not constitute a carrying on of business. But, however that may be, here the sales were to a large amount; and I cannot entertain a doubt that the defendant has broken his contract.

WILLIAMS, J.—I am entirely of the same opinion. The defendant has been guilty of a substantial breach of his agreement not to carry on the business in question within two miles of Lupus Street. The selling as *he did was as much calculated to diminish the value of the good-will of the premises as if the defendant had opened a shop within the prescribed distance. [*543

WILLES, J.—I am of the same opinion. Carrying on the same business means continuing the sale of a similar description of goods within the area of prohibition.

KEATING, J., concurred. Rule discharged.

COOK and Another *v.* LISTER. *Jan.* 19.

A vested right of action in the holder against the acceptor of a bill of exchange can in general only be got rid of by a release or by an accord and satisfaction as between them. But, if the bill is an accommodation bill, and the holder has notice of that fact when he receives it, payment by the drawer is a complete discharge.

Bills which, as between A. and B., the respective drawers, and C., the acceptor, were in the nature of accommodation paper, were endorsed to the plaintiffs, for value, and without notice of their character. A., B., and C. eventually stopped payment: and, upon the winding up of their estates under inspection, the plaintiffs received on account of the bills drawn by A. upon C. 4*s.* in the pound from A.'s estate, and 16*s.* in the pound from the estate of C.; and, upon the bills drawn by B. upon C., they received 5*s.* 7*d.* in the pound from the estate of B., and 14*s.* 5*d.* in the pound from the estate of C.

Upon the result of the whole transactions of consignment and discount between A. and B. and the plaintiffs, there remained a large balance due to the latter; and they sued C. upon his acceptances, seeking to recover the difference between the sums paid thereon *by him* and the amount of the several bills, and interest:—

Held, that they were not entitled to maintain the action either in their own right or as trustees for A. or B.

Jones *v.* Broadhurst, 9 C. B. 173 (E. C. L. R. vol. 67), observed upon.

THIS was an action brought to recover 3979*l.* 11*s.* 10*d.*, the balance alleged by the plaintiffs to be due upon six bills of exchange accepted by the defendant. The defendant paid into Court the sum of 908*l.* 15*s.* 8*d.*, and defended as to the residue; and in the result issues of law and fact arose.

The declaration contained six counts. The first was upon a bill of exchange for 1000*l.*, dated the 12th of October, 1857, drawn by W. Cheesebrough & Son upon the defendant, payable at three months, and *544] *endorsed by W. Cheesebrough & Son to the plaintiffs. The second was upon a bill for 2000*l.*, dated the 18th of November, 1857, drawn by W. Cheesebrough & Son upon the defendant, payable at three months, and endorsed by W. Cheesebrough & Son to the plaintiffs. The third was upon a bill for 2000*l.*, dated the 18th of November, 1857, drawn by W. Cheesebrough & Son upon the defendant, payable at three months, and endorsed by W. Cheesebrough & Son to the plaintiffs. The fourth was upon a bill for 5000*l.*, dated the 28th of November, 1857, drawn by Yewdall & Son upon the defendant, payable at three months, and endorsed by Yewdall & Son to W. Cheesebrough & Son, and by W. Cheesebrough & Son to the plaintiffs. The fifth was upon a bill for 3000*l.*, dated the 2d of December, 1857, drawn by W. Cheesebrough & Son upon the defendant, payable at three months, and endorsed by W. Cheesebrough & Son to the plaintiffs. The sixth was upon a bill for 750*l.*, dated the 3d of December, 1857, drawn by W. Cheesebrough & Son upon the defendant, payable at three months, and endorsed by W. Cheesebrough & Son to the plaintiffs.

First plea,—that the plaintiffs' claim in the declaration was before action, and before the tender thereinafter mentioned, satisfied and discharged by payment, except as to the sum of 878*l.* 15*s.* 8*d.*; and that such satisfaction and discharge was in manner following, that is to say, in part by payments made by the defendant to the lawful holders of the said bills of exchange after the same became due, to wit, to the Bank of England, and to certain bankers carrying on business in London under the firm of Glyn, Mills & Co., and to the plaintiffs, and in part by payments made to the plaintiffs of the proceeds of the sale of certain wool of the defendant, which proceeds they the plaintiffs were entitled to receive as holders of the said bills *of *545] exchange in the first, second, third, fifth, and sixth counts, and which they did receive as such holders in part payment and discharge of the last-mentioned bills of exchange, and in part by payments made to the plaintiffs of the proceeds of the sale of certain other wool, which last-mentioned proceeds thereof the plaintiffs were entitled to receive as holders of the bill of exchange in the fourth count mentioned, and which last-mentioned proceeds were paid to and received by them in part payment and discharge of the said last-mentioned bill of exchange, and in part by certain payments made to the plaintiffs by the drawers of the bills of exchange in the first, second, third, fifth, and sixth counts mentioned, to wit, W. Cheesebrough & Son, and which last-mentioned payments were made by the said drawers and received by the plaintiffs in part payment of the said last-mentioned bills of exchange; that the said claim of the plaintiffs having been so paid and satisfied except as to the said sum of 878*l.* 15*s.* 8*d.*, he, the defendant, before the commencement of this action, tendered and offered to pay to the plaintiffs the said sum of 878*l.* 15*s.* 8*d.*, and that the plaintiffs refused to receive or accept, and that the defendant has always been ready and willing to pay the same to the plaintiffs, and now brings the same into court ready to be paid to the

plaintiffs; that this action is brought and prosecuted by the plaintiffs wholly on their own account, and not as trustees for or on behalf of the said W. Cheesebrough & Son or the drawers of the said bills of exchange, or either of them, in respect of any part of the said claim, and that they the plaintiffs do not sue as, and are not entitled to sue as, and are not, trustees in respect of anything recovered in this action, for the said W. Cheesebrough & Son, or any other person or persons.

Second plea,—and for a second plea, by way of *equitable defence, the defendant repeats all and singular the allegations [*546 contained in the first plea, and the bringing the money into court as in that plea mentioned, and says further that the claim of the plaintiffs in the declaration mentioned is fully paid and satisfied by the moneys paid to and received by the plaintiffs as in the first plea mentioned and the said sum so tendered and paid into court, and that the plaintiffs have not, either on their behalf, or as trustees for any other person or persons, any right, cause of action, or claim in respect of the causes of action in the declaration mentioned, beyond the said moneys so paid and received by them and the said sum so tendered and paid into court, and that the plaintiffs have not brought and do not prosecute this action as trustees for or on behalf of any person or persons in respect of any portion of the claim sought to be recovered in this action.

The plaintiffs joined issue on these pleas.

Second replication to the first plea,—that the said payments made to the plaintiffs by the said drawers of the bills of exchange in the first, second, third, fifth, and sixth counts mentioned, as in the first plea alleged, were not made by the said drawers and received by the plaintiffs in payment or discharge of the said or any part of the said claim of the plaintiffs against the defendant upon and as the acceptor of the said bills of exchange in this replication mentioned, or any of them, or in satisfaction and discharge of any part of the liability of the defendant to the plaintiffs upon his acceptance of the said bills or any of them, but were made by the said drawers and received by the plaintiffs in payment of or by way of satisfaction and discharge of a part of the liability of them the said drawers upon the said bills, and were made by them as the drawers thereof only, and on their account.

*The plaintiffs also demurred to the first plea, the ground of demurrer stated in the margin being, "that the plea does not [*547 show that the payments alleged to have been made by the drawers were made for the acceptor, or in discharge or extinguishment of the acceptor's liability upon the said bills or any of them."

They likewise demurred to the second plea, the ground of demurrer stated in the margin being, "that the defence, if available at all, was a good plea in bar at law, and therefore would not sustain an equitable plea."

The defendant demurred to the second replication to the first plea, the ground of demurrer stated in the margin being, "that it is not necessary that the payments by the drawers should actually have been made in satisfaction of the liability of the defendant to the plaintiffs

on the bills, but it is sufficient if they were made in satisfaction of the bills." Joinders.

The issues of fact came on to be tried before Erle, C. J., at the sittings in London after Hilary Term, 1860, when a verdict was found for the plaintiffs for 15,000*l.* subject to the opinion of the Court upon the following case:—

1. The plaintiffs have been for many years before and since the year 1857, wool-brokers, carrying on a large business in London and Liverpool under the firm of Bradbury & Cook.

2. The defendant was in the year 1857 carrying on a large business as a wool-merchant, top manufacturer, and machine wool-comber, and otherwise, at Halifax, under the firm of S. C. Lister & Co.

3. Among other persons with whom the plaintiffs had transactions in the way of their business in and before the year 1857, were William Cheesebrough and Samuel Laycock Fee, who were then carrying on business at Bradford as wool-staplers and merchants or
*548] *dealers in wool, under the firm of William Cheesebrough & Son.

4. The course of dealing between the plaintiffs and Messrs. Cheesebrough & Son was, that the plaintiffs from time to time made purchases of wool for Messrs. Cheesebrough & Son, the terms of payment being generally cash at short dates; that the plaintiffs advised Messrs. Cheesebrough & Son of the purchases and dates of payment; and that Messrs. Cheesebrough & Son before or on the day of payment remitted to the plaintiffs the necessary amount in cash or drafts upon London bankers.

5. Towards the end of the year 1857, a general commercial crisis occurred; and in the month of October or November in that year Messrs. Cheesebrough & Son applied to the plaintiffs to receive bills of exchange instead of cash for part of the amount which they were bound to remit; and, from that time until the middle of December, Messrs. Cheesebrough & Son continued to make a large portion of their remittances by bills of exchange. Some of the bills so remitted were acceptances of Messrs. Cheesebrough & Son, others were acceptances of other persons then running, which were in the hands of Messrs. Cheesebrough & Son, and which they endorsed. The plaintiffs took the bills so remitted on account, crediting Messrs. Cheesebrough & Son with the full amounts of them, and debiting them with the amounts paid by the plaintiffs for discount on paying away or discounting the bills.

6. The circumstances under which bills of exchange in the place of cash were remitted to and taken by the plaintiffs are explained by letters which passed at that time between Messrs. Cheesebrough & Son and the plaintiffs, copies of which accompanied and formed part of the case.

*549] 7. Among the bills so remitted to and taken by the *plaintiffs were the six bills mentioned in the declaration, the particulars of which were as follows,—1. A bill of exchange dated the 12th of October, 1857, drawn by Messrs. Cheesebrough & Son upon and accepted by the defendant, for the sum of 1000*l.*, payable three months after date to the order of the drawers, endorsed by Messrs. Cheesebrough & Son to the plaintiffs on the 16th of October, 1857,—

2. A bill of exchange dated the 18th of November, 1857, drawn by Messrs. Cheesebrough & Son upon and accepted by the defendant, for the sum of 2000*l.*, payable three months after date to the order of the drawers, endorsed by Messrs. Cheesebrough & Son to the plaintiffs on the 24th of November, 1857,—3. A bill of exchange, dated the same 18th of November, 1857, drawn by Messrs. Cheesebrough & Son upon and accepted by the defendant, for the sum of 2000*l.*, payable three months after date to the order of the drawers, endorsed by Messrs. Cheesebrough & Son to the plaintiffs on the 24th of November, 1857,—4. A bill of exchange dated the 28th of November, 2857, drawn by Messrs. Yewdall & Son upon and accepted by the defendant, for the sum of 5000*l.*, payable three months after date to the order of the drawers, endorsed by Messrs. Yewdall & Son to Messrs. Cheesebrough & Son, and by Messrs. Cheesebrough & Son to the plaintiffs on the 30th of November, 1857,—5. A bill of exchange, dated the 2d of December, 1857, drawn by Messrs. Cheesebrough & Son upon and accepted by the defendant, for the sum of 3000*l.*, payable three months after date to the order of the drawers, endorsed by Messrs. Cheesebrough & Son to the plaintiffs on the 8th of December, 1857,—6. A bill of exchange, dated the 3d of December, 1857, drawn by Messrs. Cheesebrough & Son upon and accepted by the defendant, for the sum of 750*l.*, payable three months after date *to the order of the drawers, endorsed by Messrs. Cheesebrough & Son to the plaintiffs on the 10th of December, 1857. [*550

8. None of these six bills was paid at maturity; and they are now in the hands of the plaintiffs as endorsees and holders for valuable consideration, as above mentioned.

9. The following are the facts relating to the bills mentioned in the first, second, third, fifth, and sixth counts:—The ordinary business transactions between Messrs. Cheesebrough & Son and the defendant were of two descriptions,—first, sales of wools from Messrs. Cheesebrough & Son to the defendant,—secondly, consignments of wool-tops (being wool in a combed and prepared state, ready for being spun into worsted yarn) by the defendant to Messrs. Cheesebrough & Son as factors for sale. The course of dealing between them was, that the defendant paid for the wools by his acceptances of bills of exchange for the price, drawn upon him by Messrs. Cheesebrough & Son; and that Messrs. Cheesebrough & Son paid to the defendant the proceeds of the tops consigned, as and when sold, either in cash or by handing over to the defendant bills of exchange which they had received from their customers, and which in some cases were and in other cases were not endorsed by Messrs. Cheesebrough & Son. Messrs. Cheesebrough & Son also made advances to the defendant upon the security of the tops consigned to them and in their hands, previously to their being sold. The mode adopted for making these advances, was, that Messrs. Cheesebrough & Son should draw bills of exchange upon the defendant, that the defendant should accept these bills, that Messrs. Cheesebrough & Son should get the bills discounted, and should pay over the proceeds to the defendant; Messrs. Cheesebrough & Son being *secured by the tops in their hands upon which the advance was made, and being able if necessary to pay themselves out of the proceeds of those tops when sold. [*551

10. The above was the regular course of dealing up to October the 9th, 1857. From that day, a system of discounting bills began between the parties. Both firms had at that time some difficulty in meeting payments then falling or about to fall due; and each was interested in the other continuing to meet its engagements: and the discounting of bills was resorted to for this purpose. The mode adopted, was, that Messrs. Cheesebrough & Son drew bills of exchange upon the defendant, the defendant accepted these bills, Messrs. Cheesebrough & Son got them discounted, and out of the proceeds made payments to the defendant from time to time as required. The proceeds obtained by Messrs. Cheesebrough & Son upon the discounting of such bills of exchange consisted to some extent of cash, but principally of bills of exchange accepted by other persons, and which were good and bonâ fide bills given for valuable consideration. The whole of the proceeds was not in every case paid over by Messrs. Cheesebrough & Son to the defendant: and, on the balance of all the transactions in discounting bills, taken together, the total amount of the acceptances so given by the defendant considerably exceeded the total amount of the payments in cash or by bills received by him from Messrs. Cheesebrough & Son, as appears by the discount account hereinafter referred to.

11. All wools purchased by the defendant from Messrs. Cheesebrough & Son previously to the 5th of October, 1857, were settled and paid for; and no subsequent sales of wool took place between Messrs. Cheesebrough & Son and the defendant, except that *552] *on that day a parcel of wool amounting to 221*l.* 19*s.* 9*d.* was sold by Messrs. Cheesebrough & Son to the defendant.

12. Annexed were accounts extracted from Messrs. Cheesebrough & Son's books, in which the transactions between them and the defendant were entered in three accounts called "The Wool Account," "The Top Account," and "The Discount Account." Copies of these accounts accompanied and formed part of the case.

13. At and from the time the acceptances declared on were given or delivered to Messrs. Cheesebrough & Son, nothing was owing by the defendant to them on the balance of all the accounts taken together; and the result was, that Messrs. Cheesebrough & Son had received in bills running at the time of the stoppage hereinafter mentioned a very large balance of bills drawn upon the defendant by them, beyond what was due from the defendant to them.

14. The bill of exchange for 1000*l.* mentioned in the first count was drawn and accepted as part of an arrangement for an advance by Messrs. Cheesebrough upon tops of the defendant then in their hands and unsold; which advance was made in the mode previously mentioned. Upon the 14th of October, 1857, two bills of exchange for 1000*l.* each (one of which was the bill mentioned in the first count) were drawn upon the defendant by Messrs. Cheesebrough & Son, were accepted by the defendant, and were returned by him to Messrs. Cheesebrough & Son for the purpose of their getting them discounted. Upon receipt of these bills, Messrs. Cheesebrough & Son paid over to the defendant acceptances of other persons, according to the mode of dealing already explained, for 1992*l.* 17*s.* in the whole. These last-mentioned acceptances were received by the defendant, and applied

by him to his own purposes. This transaction is entered in the top *account under the date of 14th of October, 1857, on the credit side, and 15th of October on the debit side. Immediately previous to this transaction, the top account showed a balance of 6742*l.* 2*s.* 7*d.* due from Messrs. Cheesebrough & Son to the defendant. [*553

15. The acceptances for 2000*l.* and 2000*l.* mentioned in second and third counts formed part of the item of 15,713*l.* 12*s.* under date of November 18th, 1857, and were given by the defendant to Messrs. Cheesebrough & Son on that day. At that time the defendant had acceptances which he had given to Messrs. Cheesebrough & Son for wool, to the amount of 9000*l.* and 6000*l.*, falling due in seven or eight days; and he had other large acceptances to provide for: and the bills to the amount 15,713*l.* 12*s.* were given in order that Messrs. Cheesebrough & Son should get them discounted and out of the proceeds provide the defendant with money to assist him in meeting his said acceptances. In fact Messrs. Cheesebrough & Son were enabled by means of this remittance to, and did, on the 19th and 20th of November, provide the defendant with an amount of about 14,000*l.* out of such proceeds; and this was used by the defendant in part for meeting the two acceptances of 9000*l.* and 6000*l.*, and in part for meeting the other acceptances falling due about the same time. This transaction appears in the wool account under the respective dates above mentioned. Immediately before the giving of those bills, Messrs Cheesebrough & Son were indebted to the defendant in about 25,831*l.* on the discount account, and in the further sum of about 6539*l.* on the top account; and the defendant was indebted to Messrs. Cheesebrough & Son in the sum of 221*l.* on the wool account.

16. The two bills of exchange for 3000*l.* and 750*l.* respectively mentioned in the fifth and sixth counts were drawn and accepted as part of an arrangement *for raising money, according to the mode already explained. Upon the 4th of December, 1857, bills of exchange for 25,000*l.* in the whole (of which these two bills formed part) were drawn upon the defendant by Messrs. Cheesebrough & Son, were accepted by the defendant, and were handed by him to Messrs. Cheesebrough & Son for the purpose of their getting them discounted, and by means of the proceeds making advances to the defendant from time to time as required. Messrs. Cheesebrough & Son, either at the time or shortly afterwards, returned to the defendant some of these acceptances, to the amount of 11,250*l.* in the whole, not having been able to get them discounted; the remainder, including the two bills mentioned in the fifth and sixth counts, they procured to be discounted; and, upon the 7th of December, 1857, they paid over to the defendant a bill for 10,000*l.*, in pursuance of this arrangement. This bill the defendant was unable to get discounted, and his stoppage immediately followed. On the 10th of December, other bills to the amount of 2250*l.* and cash 140*l.* were remitted by Messrs. Cheesebrough & Son to the defendant. [*554

17. The following letters passed between Messrs. Cheesebrough & Son and the defendant in relation to the said item of 25,000*l.*, bearing date respectively the 3d and 4th of December:—

"Bradford, 3d December, 1857.

"Dear Sirs,—Agreeably with Mr. Oddy's instructions, we have drawn the bills, amount 25,000*l.* Please honour, and forward them to-morrow. At the same time give us the dates when you require payments being made to you, and in what form most easy for ourselves, in consideration of the present state of the discount market, you can manage with.

"WM. CHEESEBROUGH & SON.

"Messrs. S. C. LISTER & Co., Halifax."

"We will sign them on receipt."

*"Bradford, 4th December, 1857.

*555] "Gentlemen,—Your favour of this morning, enclosing bills twenty-five thousand, is duly received, and the amount passed to your credit, with thanks.

"Pro WM. CHEESEBROUGH & SON,

"J. A. MIDDLEBOOK."

"Messrs. S. C. LISTER & Co., Halifax."

18. On or about the 15th of December, 1857, the defendant stopped payment, and convened a meeting of his creditors. After some negotiation, an arrangement was made between the defendant and the greater number of his creditors; and in pursuance thereof a deed of arrangement and inspectorship, bearing date the 16th of January, 1858, was prepared and executed by the defendant, by the inspectors named in it, and by the greater number of the creditors of the defendant, including the Bank of England, the then holders of all the bills declared on except the first, for 1000*l.*, which however came into their possession before the 28th of January, 1858. A copy of this deed accompanied and formed part of the case. It provided, among other things, that the defendant should pay in full all the debts and liabilities of the firms therein mentioned, by four instalments, one, of 6*s.* 8*d.* in the pound, to be paid at the expiration of six calendar months, another, of 6*s.* 8*d.*, at the expiration of twelve calendar months, the third, of 3*s.* 4*d.*, at the expiration of eighteen calendar months, and the fourth, of 3*s.* 4*d.*, at the expiration of twenty-four calendar months from the 1st of January, 1858, with interest on such instalments respectively from that day at the rate of 5*l.* per cent. per annum, and all expenses incurred for noting and commission in consequence of the dishonour of any bills of exchange. The plaintiffs have never signed

*556] the said deed or taken bills of exchange for the several *instalments as provided by the said deed for such creditors as were desirous to have them.

19. On or about the 16th of December, 1857, Messrs. Cheesebrough & Son stopped payment, and convened a meeting of their creditors. An arrangement was afterwards made between them and their creditors; and, in pursuance thereof, a deed of arrangement and inspectorship bearing date the 22d of February, 1858, was prepared, and was executed by Messrs. Cheesebrough & Son, by the inspectors named in it, and by the greater number of the creditors, including among others the plaintiffs. The debt or claim of the plaintiffs against Messrs. Cheesebrough & Son amounted at the time to about 20,694*l.* 18*s.*, including the claim of the plaintiffs against them as drawers and endorsers of five of the said six bills of exchange respectively, and

as endorsers of the sixth of such bills; but the exact amount was not inserted in the deed, nor had it at that time been ascertained or agreed upon between them. A copy of this deed accompanied and formed part of the case.

20. At the time that the defendant and Messrs. Cheesebrough & Son respectively stopped payment, there were in the hands of Messrs. Cheesebrough & Son certain wool-tops of the defendant. Under an arrangement which was made between the parties interested in these tops, they were afterwards sold; and the plaintiffs received out of the proceeds the amounts hereinafter mentioned by way of dividend upon the said bills.

21. Payments and sums of money in respect of the five bills of exchange mentioned in the first, second, third, fifth, and sixth counts have been made to the extent and under the circumstances now to be mentioned:—Upon the 1st of June, 1858, the Bank of England, as the then holders of these bills, received *from the defendant [*557
and his inspectors named in the deed of arrangement of the 16th of January, 1858, a payment of 6*s.* 8*d.* in the pound upon the amount of each of the said five bills of exchange, together with interest, &c., thereon; and at the same time one of the clerks of the Bank of England produced the bills, when the following endorsement was made upon each:—

"1858. June 1st. 6*s.* 8*d.* in the pound with interest, paid on this bill by Mr. Lister and his inspectors R. R., H. W. B.," the initials "R. R." being those of Mr. Richard Ridehalgh, the solicitor, and the initials "H. W. B." being those of Mr. Henry Webster Blackburn, the accountant acting for Mr. Lister and his inspectors.

22. Upon the 1st of January, 1859, the plaintiffs, through Mr. John Gibson, the manager of the Bradford Commercial Joint Stock Company, received from the defendant and his inspectors a second payment of 6*s.* 8*d.* in the pound upon the amount of each of the said five bills, with interest, &c., and at that time Mr. John Gibson produced the bills, when an endorsement similar, mutatis mutandis, to that of the 1st of January, 1858, was made upon each of them.

23. Upon the 7th of March, 1859, the plaintiffs, through the said Mr. John Gibson, received out of the proceeds of the before-mentioned tops of the defendant a payment of 1*s.* 4½*d.* in the pound upon the amount of each of the said five bills; and at that time Mr. John Gibson produced the bills, when the following endorsement was made upon each,—"7th March, 1859. 1*s.* 4½*d.* in the pound on this bill paid out of the proceeds of Messrs. S. C. Lister & Co.'s tops. R. R., H. W. B."

24. There were in the hands of third parties, at the time of the suspension of Messrs. Cheesebrough & *Son and Messrs. Lister [*558
& Co., bills of exchange drawn by Cheesebrough & Son, and accepted by Lister & Co. to the amount of 100,871*l.* 1*s.* 1*d.*, and Messrs. Lister & Co. had only received consideration from Messrs. Cheesebrough & Son to the amount of 57,809*l.* 1*s.* 3*d.*; so that Messrs. Lister & Co., after paying the full amount of the acceptances, would be creditors of Messrs. Cheesebrough & Son to about 43,000*l.*, without taking into account any payments which Messrs. Lister & Co. might be compelled to make to the holders of bills of exchange paid to them by

Messrs. Cheesebrough & Co., and not provided for by the previous holders.

25. On the 9th of June, the following terms of arrangement were reduced into writing between the defendant and the inspectors of Messrs. Cheesebrough's & Son's estate:—

"In the Matter of William Cheesebrough & Son, in liquidation, and S. C. Lister & Co. of Halifax.

"It is understood between the inspectors of the estate of Messrs. Cheesebrough & Son on the one part, and Mr. S. C. Lister on the other part, that all the holders of bills on which the estates of William Cheesebrough & Son and Edward Smith are together liable, shall, in respect of these bills, take the share of the proceeds of Edward Smith's wool in the hands of William Cheesebrough & Son which under the order made by the Court of Bankruptcy at Leeds in the matter of William Cheesebrough & Son and Smith's billholders, such billholders are entitled; and that no claim shall be made by Messrs. Cheesebrough & Son's estate for the repayment of any part of the amount to be so paid in respect of any bill or bills in which S. C. Lister & Co. are interested: and, it having been ascertained by Mr. H. W. Blackburn, the accountant, that, of the *acceptances
*559] given by Messrs. S. C. Lister & Co. to Messrs. Cheesebrough & Son, the amount of 38,684*l.* 11*s.* 6*d.* only are legitimately provable against the estate of William Cheesebrough & Son, being the amount which upon the ultimate balance of accounts would be due from William Cheesebrough & Son to S. C. Lister & Co. after the firm of S. C. Lister & Co. shall have paid all their own acceptances in full: Mr. S. C. Lister, therefore, now undertakes that he will ultimately provide for the whole of S. C. Lister & Co.'s acceptances of William Cheesebrough & Son's drafts, with the exception of bills amounting to 38,684*l.* 11*s.* 6*d.*; and that, on all proofs against William Cheesebrough & Son's estate upon such acceptances beyond the amount above mentioned, Mr. Lister will repay to the estate of William Cheesebrough & Son whatever may be paid in respect of such excess of proof; and, until repayment, the share of proceeds of E. Smith's wool, and the dividends from William Cheesebrough & Son's estate payable in respect of bills paid by William Cheesebrough & Son to S. C. Lister & Co., and held by the Halifax Joint Stock Bank and S. C. Lister & Co., shall be withheld. Dated this 9th day of June, 1859.

"S. C. LISTER."

26. The defendant claimed and received from the inspectors of Messrs. Cheesebrough & Son named in the said deed the dividend at the rate of 4*s.* in the pound; but the amount upon which it was received was not precisely 38,684*l.* 11*s.* 6*d.*, for reasons which it is not necessary to state. Upon the 11th of June, 1859, Messrs. Cheesebrough & Son and their inspectors named in the said deed of the 22d of February, 1858, paid to the plaintiffs 2077*l.* 10*s.* 5*d.*, being the amount of the first dividend of 4*s.* in the pound upon the sum of
*560] 10,387*l.* 12*s.*, which sum had been adjusted as the *amount on which the plaintiffs were entitled to prove, and included the amounts of the bills mentioned in the first, second, third, fifth, and sixth counts of the declaration. On that occasion, these five bills were produced by the plaintiffs, and the following endorsement was

written or stamped on each,—"June 11th, 1859. A first dividend of 4*s.* in the pound paid on this bill from Wm. Cheesebrough & Son's estate. J. H. W., H. W. B.;" the initials being those of Mr. J. H. Wade, the solicitor, and Mr. H. W. Blackburn, the accountant to Cheesebrough & Son and their inspectors. At the same time the following receipt was taken from the plaintiffs:—

"11th June, 1859.

"Re Wm. Cheesebrough & Son, in liquidation.

"Received the sum of two thousand and seventy-seven pounds, ten shillings, and five pence, being the amount of a first dividend of 4*s.* in the pound payable to us upon ten thousand three hundred and eighty-seven pounds twelve shillings.

"2077*l.* 10*s.* 5*d.*" "BRADBURY & COOK."

27. On the 4th of August, 1859, the following notice, signed by the solicitors of the inspectors of Messrs. Cheesebrough & Son's estate, was served on the plaintiffs by the direction of Messrs. Cheesebrough & Son and their inspectors:—

"Bradford, 4th August, 1859.

"In the Matter of Wm. Cheesebrough & Son.

"Dear Sirs,—We beg to inform you, that, previously to the payment in liquidation of the dividend of 4*s.* in the pound recently made to the creditors on the above estate, an arrangement was made with Messrs. S. C. Lister & Co., by which the dividend then about to be paid by Messrs. Cheesebrough & Son's estate in respect of bills of exchange upon which Messrs. S. C. *Lister & Co. are liable [*561
antecedently to Messrs. Cheesebrough & Son, should, as between the estates of Messrs. Cheesebrough & Son and Messrs. S. C. Lister & Co., be treated as paid on account of Messrs. S. C. Lister & Co., and afterwards taken into account and adjusted in a mode then agreed upon. Messrs. Cheesebrough & Son, therefore, desire that you should not claim from Messrs. S. C. Lister & Co. the payment of any amount which is included in the dividend paid to you out of Messrs. Cheesebrough & Son's estate. "RAWSON, GEORGE & WADE."

"Messrs. Bradbury & Cook."

28. The following are the facts relating to the bill mentioned in the fourth count. Messrs. Yewdall & Son, the drawers of the bill, were wool merchants; and the defendant purchased wools of Messrs. Yewdall & Son, and gave his acceptances in payment, which were latterly provided for by Messrs. Yewdall & Son by drawing further bills upon the defendant, and then providing him with funds to meet the former bills. The result was, that, at the time of the stoppage of Cheesebrough & Son, the defendant, and W. Yewdall & Son, the defendant had accepted bills of Messrs. Yewdall & Son to a much larger amount than he had received value for. Messrs. Yewdall & Son had large transactions with Cheesebrough & Son. The latter acted as factors for the former, and had accepted bills to a large amount upon general consignment. The bill for 5000*l.*, viz. that drawn for Yewdall & Co. on the defendant, was given under the following circumstances:—The defendant had in 1857 purchased wool to a large amount from Messrs. Yewdall & Son, and had given bills in payment which when due were by arrangement between them to be extended by renewals or bills of

later date into 1858. Two bills of exchange given under those circumstances were falling due on *the 3d of December, viz. one for 11,713*l.* 4*s.*, and the other for 3780*l.* 14*s.* 6*d.* On the 6th of November, 1857, in order to make provision for these bills, the defendant delivered to Messrs. Yewdall & Son his acceptance for 11,991*l.* 5*s.* 6*d.* due 13th of March, 1858, which Messrs. Yewdall & Son discounted, and handed over to the defendant the sum of 10,500*l.* in bills and cash; and the defendant, on the 3d of December, 1857, paid the two bills for 11,713*l.* 4*s.* and 3780*l.* 14*s.* 6*d.* Another bill given by the defendant to Yewdall & Son, for 8646*l.* 17*s.*, was falling due on the 13th of December; and, on or about the 28th of November, Mr. Yewdall and the defendant met for the purpose of making provision for the meeting of that bill.

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29. The following letter, written by Mr. Brown, the then partner of the defendant, to Yewdall & Son on the 25th of November, had relation to this bill:—

"Halifax, Nov. 25th, 1857.

Dear Sir,—"You promised to write us ere this on the subject of the writer's interview with you the other day. No improvement whatever has taken place here; consequently, I can only confirm what I said the other day, that, unless you carry out in its entirety the agreement entered into with you, there is no alternative. We have other and heavy engagements in our regular business, which will require all our endeavours to meet; and, as the transaction with you was of a perfectly understood nature, upon you, not on us, must rest to provide the needful. I beg of you to take the whole of this positively and literally. Let there be no mistake about it. The whole amount must be provided for by you. Therefore, we give you notice in due time. There is very little time for the remainder of the first bill to be had from you. We shall, therefore, be glad of a remittance in due course. Telegraph *to me on the receipt of this, saying whether or no I am to come up and see you. HENRY BROWN."

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"John Yewdall, Esq."

30. On that occasion (28th November) Messrs. Yewdall & Son drew and the defendant accepted bills of exchange for 14,950*l.* 10*s.* 6*d.*; and the defendant delivered the acceptances to Mr. Yewdall, including the bill for 5000*l.* mentioned in the fourth count, which he was to get discounted and hand over the proceeds to the defendant, to enable him to meet the bill for 8646*l.* 17*s.*, and also pay him the difference between the amount of the two bills for 11,713*l.* 14*s.* and 3780*l.* 14*s.* 6*d.*, and the 10,500*l.* received by him as before mentioned. The acceptances for 14,950*l.* 10*s.* 6*d.* were discounted by Messrs. Yewdall & Co.; but the proceeds were never received by the defendant. All that the defendant obtained from Messrs. Yewdall & Son in respect of the acceptances for 14,950*l.* 10*s.* 6*d.*, was, their acceptance for 10,000*l.*, which he was unable to discount with his bankers: and the suspension of the defendant immediately followed.

31. On the 17th of December, 1857, Messrs. Yewdall & Son stopped payment. An arrangement was entered into between them and their creditors, and in pursuance thereof a deed of inspectorship bearing date the —— day of ———, 1858, was prepared, and was executed by Messrs. Yewdall & Son, by the inspectors named in it, and by the

principal creditors, including the plaintiffs. A copy of this deed accompanied and formed part of the case.

32. At the time that Messrs. Cheesebrough & Son and the defendant and Messrs. Yewdall & Son respectively stopped payment, there were in the hands of Messrs. Cheesebrough & Son certain wools the property of Messrs. Yewdall & Son. Under an *arrangement [*564 which was made between the parties interested in these wools, they were afterwards sold; and the plaintiffs, as holders of the bill for 5000*l.*, received out of the proceeds the amount hereinafter mentioned by way of dividend upon the amount of this bill, having previously signed the under-mentioned documents.(*a*)

(*a*) "To Messrs. William Cheesebrough and Samuel Laycock Tee, of Bradford, in the county of York, wool-staplers, carrying on business under the firm of W. Cheesebrough & Son, and to Messrs. William Ackroyd, John Foster, Edward Townend, and William Quilter, the inspectors appointed by the creditors of the said firm to superintend the winding up of their estate.

"Gentlemen,—We, the undersigned, being the holders of the several bills of exchange, the dates, amounts, and particulars of which are set opposite to our respective names in the schedule on the other side written, and as such entitled to the proceeds of certain property in the hands of the said firm of W. Cheesebrough & Son, as agents or factors for Messrs. Yewdall & Son, both firms being insolvent, do hereby request and authorize you to pay over to Messrs. William Fowler and Arthur George Chapman such proceeds on our behalf; and we do declare that the said William Fowler and Arthur George Chapman are fully authorized on our behalf to settle and adjust with you all accounts, claims, and matters in reference to the said proceeds and rights, and to bind us in reference thereto; also that their receipts shall be to you good and sufficient discharges for all moneys and effects to which we may be entitled as aforesaid, and shall exonerate you and every of you from all responsibility in respect of the application of the said moneys."

"November 25, 1858.

"Memorandum of agreement made and entered into this 25th of November, 1858, between the undersigned persons and firms mentioned in the schedule hereunder written or hereunto annexed, of the one part, and William Fowler, of &c., and Arthur George Chapman, of &c., of the other part: Whereas, W. Cheesebrough & Son suspended their payments on or about the 16th of December last; and whereas John Yewdall, of Rawden, in the county of York, wool-stapler, carrying on business under the firm of Yewdall & Son, at or about the same period also suspended payment: and whereas the estates of the said W. Cheesebrough & Son and of the said John Yewdall are now in course of liquidation under deeds of inspectorship providing for the administration of the said estates in accordance with the laws of English bankruptcy; and whereas the undersigned persons and firms mentioned in the said schedule, being respectively holders of the bills of exchange mentioned or referred to in the said schedule, and the amounts of which bills are set opposite to their respective names or signatures, claim to be entitled to the proceeds of certain wools belonging to the said John Yewdall, trading as aforesaid, and by him consigned to or deposited on his behalf with the said firm of W. Cheesebrough & Son for sale on commission or otherwise; Now it is hereby agreed between and by the said parties hereto, and the undersigned persons and firms named or referred to in the said schedule do hereby agree, as follows, namely, that the said William Fowler and Arthur George Chapman, on behalf of the persons and firms named or referred to in the said schedule, be authorized to act as trustees for the purpose of receiving from all parties interested the whole of the said bills, and by these means and otherwise as may be necessary obtaining possession of the said wools or the proceeds thereof, and that they the said William Fowler and Arthur George Chapman have full power to use the names of the undersigned for that purpose, or any of them, either individually or as representing the whole or some only of them, and otherwise for accomplishing the objects set forth in this memorandum, and their receipt given to the said Messrs. Cheesebrough & Son or their inspectors or others holding the said wool, or the proceeds thereof, shall be a sufficient discharge to the parties paying or delivering the same for the amount of the money or the particulars of the goods in and by such receipt expressed to be paid or received; that, upon the receipt of the proceeds of the said wools, the said William Fowler and Arthur George Chapman are to divide the same, after payment or deduction of the expenses incurred by them or by the inspectors of the estate of Cheesebrough & Son in the realization of the proceeds of the said wools, or the appropriation thereof, or otherwise relating to the claims of the bill holders, rateably amongst the holders of the whole of the said bills; that the said William

*565] *33. Payments and sums of money in respect of the bill of exchange mentioned in the fourth count have been made to the extent and under the circumstances now to be mentioned:—Upon the 1st day of June, 1858, the Bank of England, as the then holders *566] of this *bill, received from the defendant and his inspectors a payment or first instalment of 6*s.* 8*d.* in the pound upon the amount of the said bill, with interest, &c.; and an endorsement was then made upon that bill similar to that made at the same time upon each of the other five bills mentioned in the declaration. Upon the 1st of January, 1859, the plaintiffs received from the defendant and his inspectors a second payment or instalment of 6*s.* 8*d.* in the pound upon the amount of the same bill, with interest, &c.; and an endorsement was then made upon that bill similar to that made at the same time upon each of the other five bills.

*567] 34. Upon the 5th of January, 1859, the plaintiffs *received out of the proceeds of the before-mentioned wools of Messrs. Yewdall & Son which were in the hands of Messrs. Cheesebrough & Son, a payment or dividend of 5*s.* 7*d.* in the pound upon the amount of the said bill; and at that time the bill was produced, and the following endorsement made upon it,—"4th January, 1859. Paid 5*s.* 7*d.* in the pound, proceeds of wool re Cheesebrough and Son, Ex parte Yewdall & Son. M. S. & Y. G." The initials M. S. & Y. G. were those of the solicitors in London for the trustees distributing the fund.

35. At the same time, the following receipt was given by the plaintiffs,—"Received the 4th of January, 1859, of William Fowler and Arthur G. Chapman the sum of 2177*l.* 10*s.*, being 5*s.* 7*d.* in the pound on the bills of exchange for 7800*l.* held by us, and our proportion of the proceeds of certain wools in the hands of Messrs. Cheesebrough & Son divisible among the holders of certain bills of exchange in respect of which the said firms of Cheesebrough & Son and Yewdall & Son are jointly liable. BRADBURY & COOK."

36. Upon the 7th of March, 1859, the plaintiffs received out of the proceeds of the before-mentioned tops of the defendant which were in the hands of Messrs. Cheesebrough & Son a payment of 1*s.* 4½*d.* in the pound upon the amount of the said bill; and the bill was then produced, and an endorsement made upon it similar to that made at the same time upon the other five bills. The plaintiffs received no dividend from the estate of Messrs. Cheesebrough & Son upon this bill, or any part of the amount of it.

37. The defendant retained Messrs. Yewdall & Son's said acceptance for 10,000*l.*, and as the holder of it received out of the proceeds of the same wools of Messrs. Yewdall & Son in Messrs. Cheesebrough &

Fowler and Arthur George Chapman shall incur no personal responsibility whatever in the conduct of this matter, but shall be indemnified by the undersigned for any legal or other expenses which they may incur in carrying out the objects of this memorandum, as to which they are to have full discretion to take such proceedings or to discontinue the same where taken as they or their legal advisers may think advisable, and also that they shall be at liberty to employ such persons as accountants or otherwise as they may think necessary or proper, it being clearly understood that no personal risk or liability whatever is to attach or belong to the said William Fowler and Arthur George Chapman by reason of any failure on their part to accomplish the objects of this memorandum, or otherwise with relation to the matters aforesaid, or any of them."

The names of Bradbury & Cook appeared in the schedule as the holders of the bill for 5000*l.* mentioned in the fourth count of the declaration.

Son's hands a dividend or share at the same rate of 5*s.* 7*d.* *in the pound upon the amount of that bill. Messrs. Yewdall [*568 & Son have taken a credit as between them and the defendant for the dividend of 5*s.* 7*d.* in the pound on the 5000*l.* bill received by the plaintiffs out of the proceeds of their wool, as before mentioned. Upon taking the account between the two estates of Messrs. Yewdall & Co. and the defendant, a sum of 9400*l.* 8*s.* 11*d.* on the balance would be due from Messrs. Yewdall & Son to the defendant, giving the defendant credit for the payment in full of all his acceptances of bills drawn upon him by Messrs. Yewdall & Son, and after giving credit to Messrs. Yewdall & Son for the said dividend of 5*s.* 7*d.* in the pound paid upon the bill mentioned in the fourth count. Accordingly, on the 13th of April, 1860, the defendant claimed and received a dividend of 4*s.* 4*d.* in the pound upon that amount from Messrs. Yewdall & Son's estate.

38. On the 1st of July, 1859, all the creditors of the defendant except the plaintiffs, received from the defendant and his inspectors a third payment of 3*s.* 4*d.* in the pound upon the amount of their respective debts, with interest, &c., as before mentioned, or so much of that amount as was actually due to them. The defendant refused to pay to the plaintiffs the full amount of the said instalment and interest; but was prepared to pay the plaintiffs what would remain due on all the bills after taking credit for the said dividend paid out of Messrs. Cheesebrough & Son's estate on the said 11th of June, 1859, on five of the bills, and the dividend or payment out of Messrs. Yewdall & Son's wools paid on the 4th of January, 1859, on the other bill: and he contends that he is entitled, under the circumstances, to the benefit in this action of these respective dividends and payments.

39. The plaintiffs, on the other hand, claim from the defendant, and contend that they are entitled to *recover, the balance of prin- [*569 cipal and interest up to the day of the trial upon the said six bills of exchange, after crediting the payments made by the defendant and his inspectors and the amount received from the proceeds of the said tops belonging to him: and they contend that the defendant is not entitled to the benefit of the said dividend of 4*s.* in the pound received by the plaintiffs from Messrs. Cheesebrough & Son's estate, or of the said payment of 5*s.* 7*d.* in the pound received by the plaintiffs out of the proceeds of the wools of Messrs. Yewdall & Son under the circumstances before mentioned.

40. The defendant, on the 6th of January, 1860, paid into Court the sum of 878*l.* 15*s.* 8*d.*, and on the 14th of February, 1860, the further sum of 30*l.*, making in all the sum of 908*l.* 15*s.* 8*d.*, the effect of which is, that, if he is right in his contention, all the said bills of exchange are fully discharged and paid.

The court was to be at liberty to amend or alter the pleadings in such manner and upon such terms as they might think necessary or advisable to determine the real questions at issue between the parties.

The Court were to have power to draw all inferences of fact.

41. The questions for the opinion of the Court were,—first, whether the dividend of 4*s.* in the pound received by the plaintiffs out of Messrs. Cheesebrough & Son's estate as above stated in respect of the bill of exchange mentioned in the first count, discharges the defendant

as the acceptor to that extent from liability to the plaintiffs upon such bill,—secondly, whether the said dividend of 4*s.* in the pound received by the plaintiffs in respect of the said bills of exchange mentioned in the second and third counts, discharges the defendant as the acceptor to that extent from liability to the plaintiffs upon such bills,—
*570] *thirdly, whether the said dividend of 4*s.* in the pound received by the plaintiffs in respect of the said bills of exchange mentioned in the fifth and sixth counts, discharges the defendant as the acceptor to that extent from liability to the plaintiffs upon such bills, —fourthly, whether the dividend or payments of 5*s.* 7*d.* in the pound received by the plaintiffs out of the proceeds of Messrs. Yewdall & Son's wools as before stated, in respect of the bill of exchange mentioned in the fourth count, discharges the defendant as the acceptor to that extent from liability to the plaintiffs upon that bill.

If all these questions should be answered in the affirmative, then the verdict entered for the plaintiffs was to be set aside, and a verdict to be entered for the defendant. If all or any of these questions should be answered in the negative, the verdict entered for the plaintiffs was to stand for such amount as might be afterwards ascertained to be correct, in accordance with the answers to the above questions.

Montague Smith, Q. C. (with whom was *Watkin Williams*), for the
*571] plaintiffs.(*a*)—The main question is, *whether the defendant is entitled to have credit for the payments made on account of the bills mentioned in the first, second, third, fifth, and sixth counts by Cheesebrough & Son's inspectors. As between these parties, the

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That they are entitled to have all the four questions which are submitted for the opinion of the Court answered in their favour, and to have the verdict stand for them:

"2. That, as to the first three questions, the receipt by the plaintiffs of the dividend mentioned in those questions did not discharge the defendant as the acceptor to that extent from liability to the plaintiffs upon the bills; and that, notwithstanding such dividend or payment by or on account of the drawers, the plaintiffs are entitled to be paid by or recover from the defendant as the acceptor the full amount of the bills of exchange, with interest, according to the engagement entered into by him by virtue of his acceptance of the bills: Jones *v.* Broadhurst, 9 C. B. 173:

"3. That a payment made by the drawer upon a bill of exchange, in respect of his own liability as drawer, does not satisfy or discharge the liability of the acceptor as acceptor; and that, in order that a payment by the drawer may have any such effect, it must be made by him and received by the holder of the bill as a payment on account of the *acceptor*, and in discharge of the acceptor's liability:

"4. That, in this case, the dividend upon the estate of Messrs. Cheesebrough & Son was a payment which the plaintiffs were entitled to receive and did receive in respect of their claim against the firm as *drawers*, and independently of any claim against the defendant as acceptor; and that their position in this respect was not and could not be altered by the secret arrangement between the defendant and the inspectors of Messrs. Cheesebrough & Son mentioned in paragraph 25 of the special case, or by the subsequent letter of the 4th of August, 1859, set out in paragraph 27:

"5. That the only exception to the propositions above stated, is, in the case of bills of exchange accepted by the acceptor for the accommodation and benefit of the drawer; but that none of these bills were accommodation bills,—the defendant in each case being intended to receive and in fact receiving either consideration or part of the proceeds, and the defendant, as appears by paragraphs 24 and 25 of the special case, being debited, as between himself and Messrs. Cheesebrough & Son, as the acceptor of these bills, and as the person primarily liable thereon for the amount of the bills:

"6. As to the last question, that the dividend or payment mentioned in this question did not discharge the defendant as the acceptor to that extent from liability to the plaintiffs upon that bill, for reasons similar to those assigned in respect of the first three questions."

bills are not accommodation bills. "An *accommodation bill," [*572
says Byles, J.,—Byles on Bills, 8th edit. 119,—"is a bill to which the accommodating party, be he acceptor, drawer, or endorser, has put his name, without consideration, for the purpose of benefiting or accommodating some other party, who desires to raise money on it, and is to raise money on it, and is to provide for the bill when due. A party who procures another to lend his acceptance thereby engages either himself to take up the bill, or else within a reasonable time before the bill becomes due to provide the accommodation acceptor with funds for so doing, or, lastly, to indemnify the accommodation acceptor against the consequences of non-payment." This case is governed by Jones *v.* Broadhurst, 9 C. B. 173 (E. C. L. R. vol. 67), where this Court, after much consideration, held that satisfaction of a bill as between a drawer or endorser and an endorsee, whether before or after the bill becomes due, does not necessarily enure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the endorsee. The plaintiffs, as endorsees, sued the defendant as acceptor of a bill of exchange for 49*l.* The latter pleaded, that, after the endorsement, and before the commencement of the action, the drawer delivered to the plaintiffs, and the plaintiffs accepted, goods of the value of 50*l.*, in satisfaction and discharge of the bill, and of all damages and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the bill, had always held the same against the will and consent of the drawers, and so held the same; and that the plaintiffs had commenced the action, and prosecuted the same, against and in opposition to the will and consent of the drawers. After verdict for the defendant, it was held that the plea was no bar to the plaintiff's right to recover against the defendant on the bill. The ground of that judgment was, [*573
*that payment by a stranger to the record is no satisfaction. In giving judgment, the Court say: "In considering the case upon principle, it may be proper to advert to the legal relation in which the respective parties stand towards each other, upon the effect of whose acts and rights the determination of the rule must depend. It is to be observed that the drawers and acceptors are parties to the same instrument, as contractors with each other, and not as joint-contractors with a third person; and that, by the endorsement of the bill, independent and different contracts arise on the respective parts of the drawers and the acceptor with the endorsees. The acceptor is primarily and absolutely liable to pay the bill according to its tenor. The drawers are liable only upon the contingencies of the acceptor's or drawee's making default, and of the holder's performing certain conditions precedent, such as, presenting the bill according to its tenor, and giving due notice of the failure of the acceptor or drawer to pay, upon a proper presentment. The contracts created by the bill, as regards the drawer and the acceptor, are therefore essentially distinct; and there seems to be no legal ground why the endorsee of a bill may not accept satisfaction of the contingent or absolute liability of the drawer, without by so doing discharging the acceptor. The competency of an acceptor to pay may be doubtful; and no valid reason is apparent why the endorsee may not release and discharge the drawer or an endorser by competent and legal means, either upon

consideration more or less valuable or without, and retain his remedies against the acceptor,—unless in the case of an accommodation bill, in which case the acceptor is a mere surety as between him and the drawer, and entitled to recover against the drawer whatever he
*574] may be compelled to pay in *discharge of his suretyship." This Court cannot go into any question as to the equitable rights as between the drawers and the acceptor. "Supposing," say the Court, "the effect of the plea to be, that the plaintiffs are suing as trustee for the drawers, but against their consent, such matters would furnish no legal bar to the plaintiffs, as the law can take no notice of the trust, nor, consequently, whether the trustee is enforcing his legal rights against a third person with or against the consent of his cestui que trust." The Court cannot administer any equity unless it can do complete equity between the parties. [WILLES, J.—How do the Court there deal with Pownal *v.* Ferrand, 6 B. & C. 439 (E. C. L. R. vol. 13); 9 D. & R. 603 (E. C. L. R. vol. 22)?] "It is to be observed," they say, "that the plaintiff in that case had paid 40*l.* on account of a bill endorsed by him, and which had been accepted by the defendant for 350*l.* After the payment of 40*l.* by the plaintiff, the holder of the bill brought an action upon the bill against the defendant, the acceptor, and recovered a verdict for the whole amount of the bill, 350*l.*, but afterwards levied the balance only due to him, giving credit for the 40*l.* which the plaintiff had paid: and, in consequence of the defendant's having thus derived the benefit of the plaintiff's payment, the action was brought by the plaintiff to recover the amount as money paid to the defendant's use; when it was contended that the plaintiff could only sue upon the bill: but the Court held that there might be a difficulty in suing upon the bill, by reason of a judgment having been recovered against him for the whole amount of the bill by a former holder; and that, the defendant having had the benefit of the payment, an action for money paid might be maintained." Nothing short of payment by the acceptor, or a release, will discharge his liability. Payment by the drawer in discharge of
*575] *his* liability on the bill, is no release of *the acceptor. Jones *v.* Broadhurst is the leading case upon this subject, and was decided upon sound principles. It was acted upon in this Court in the subsequent case of Randall *v.* Moon, 12 C. B. 261 (E. C. L. R. vol. 74). There, two actions having been brought upon a bill of exchange,—one against the drawer, the other against the acceptor,—the defendant in the first action obtained a Judge's order for a stay of proceedings on payment of debt, interest, and costs: and it was held that the payment under that order could not be pleaded in bar of the further maintenance of the second action, as a payment in satisfaction and discharge of the causes of action against the acceptor, or relied on as a ground for reduction of damages. Jervis, C. J., there says: "It seems to me that the payment and acceptance of the money under the Judge's order in the action by the plaintiff against Turner, the drawer,—the plaintiff having no notice that Moon was an accommodation acceptor,—cannot be considered as a payment on behalf of the acceptor, or an acceptance in satisfaction and discharge of the causes of action against the acceptor; because a right of action for damages had vested at the time." [ERLE, C. J.—The substance of the

decision there is, that the defendant could not reduce the amount, because there was no plea of payment. WILLIAMS, J.—The point left undecided in Jones *v.* Broadhurst was decided in Belshaw *v.* Bush, 11 C. B. 191 (E. C. L. R. vol. 73).] The question here is, whether the defendant can say in a Court of law that he has paid these bills, by reason of the payments made on account of them by the inspectors of Cheesebrough & Son's estate,—he having claimed and received a dividend from that estate upon the footing of his having paid them. The only difference as to the bill in the fourth count is, that Messrs. Yewdall & Son got the proceeds of the discount, giving their own acceptance for 10,000*l.*, which was not paid.

**Bovill*, Q. C. (with whom were *Manisty*, Q. C., and *Cleasby*, Q. C.), contrà.(*a*)—The plaintiffs having received from Lister [*576 16*s.* in the pound on account of Cheesebrough & Son's bills and 14*s.* 5*d.* in the pound on account of Yewdall & Son's bill, and the respective balances from the estates of those parties, have received all they are entitled to. Upon what principle can the holder of a bill who has already received 20*s.* in the pound upon it claim more? The only possible ground upon which it can be put, is, that, as to the 4*s.* in the pound and the 5*s.* 7*d.* in the pound, the plaintiffs are suing as trustees for the drawers of the respective bills. But, for that, under the circumstances disclosed by the special case, there is no pretence here. The rule of law is most accurately stated in Byles on Bills, 8th edit. 204,—"It was long an unsettled question whether payment in part or in full by the drawer to the holder will discharge the acceptor pro tanto, or whether the holder may, nevertheless, recover the whole amount from the acceptor, and hold an *equivalent to the [*577 amount received from the drawer, as money received by the acceptor to the drawer's use. It has been thought that the holder can only recover of the acceptor the amount of the bill minus the sum paid by the drawer. The acceptor being the principal, and the drawer the surety, it might seem that a payment by the drawer discharges the acceptor's liability to the holder pro tanto, and makes the acceptor liable to the drawer for money paid to his use, and that, if the drawer pay the whole bill, nominal damages only can be recovered by the holder of the acceptor. The better opinion, however, seems to be, that, to an action against the acceptor, payment by the drawer is no plea, but only converts the holder into a trustee for the drawer when the holder afterwards recovers of the acceptor. But payment by the drawer of an *accommodation* bill is a complete discharge of the bill:" for which he cites Lazarus *v.* Cowie, 3 Q. B. 459 (E. C. L. R. vol. 43). Why is that? Because, in the case of an accommodation acceptance,

(*a*) The points marked for argument on the part of the defendant were as follows:—

"1. That the claim of the plaintiffs on all the bills is fully satisfied by the payments received by them from the defendant and Messrs. Cheesebrough & Son's estate, and out of the proceeds of the wool of the plaintiff and of Messrs. Yewdall & Son, together with the payment into Court:

"2. That the bills declared on are so far in the nature of accommodation bills that payments made to the holders on account of the drawers enure to the benefit of the acceptor:

"3. That, in the present case, the payments made by Messrs. Cheesebrough & Son, and for the proceeds of Messrs. Yewdall & Son's wool, were intended to operate on behalf of the acceptors, and have been adopted by all parties as so operating, and that the plaintiffs are in the present case precluded from setting up the character of trustees on behalf either of Messrs. Cheesebrough & Son or Messrs. Yewdall & Son."

the money cannot be recovered for the drawer, he having no recourse over against the acceptor. [WILLIAMS, J.—That may be subject to this qualification,—where the holder has notice that the bill was accepted for the accommodation of the drawer.] In Williams *v.* James, 15 Q. B. 498 (E. C. L. R. vol. 69), it was held, that, if the drawer of a bill payable to his own order endorses it, and it is accepted and dishonoured, the drawer, having received it back and paid the amount to his endorsee, may return the bill to such endorsee for the purpose of his suing the acceptor upon it as trustee for the drawer; and that the payment is no answer to an action by such endorsee, if there be evidence, that, when the drawer paid, the bill was left in the hands of the endorsee for the purpose of its being put in suit. In the course of the argument, Patteson, J., observes, "No doubt, a drawer, *having taken up the bill, may sue the acceptor." "But," he asks, "is there any authority for saying that a holder, after he has been satisfied for the bill, may do so?" The right to prove for the amount under such circumstances, is established by the case of Bassett *v.* Dodgin, 9 Bingh. 653 (E. C. L. R. vol. 23), 2 M. & Scott 777 (E. C. L. R. vol. 28). The real question here is, whether, supposing Cheesebrough & Son and Yewdall & Son themselves to have paid these bills in full, they could have sued Lister. If they could not, there can be no pretence for saying that the plaintiffs may. The statements in the case show a long course of dealing in bills between these parties for the purpose of raising money to meet their mutual necessities, and that, in the result, the estates of Cheesebrough & Son and Yewdall & Son were both largely indebted to Lister. Jones *v.* Brodhurst, therefore, has no application whatever to the present case.

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Smith, in reply.—There must be a payment in satisfaction of the liability of the party who is primarily liable on the bill, and taken as such with knowledge of the circumstances, to constitute a defence to an action by the holders. In stating the account with the inspectors of Cheesebrough & Son's and Yewdall & Son's estates, Lister takes credit as having paid the full amount of these bills; whereas, in truth, he has only paid 16*s.* in the pound as to five of them, and 14*s.* 5*d.* in the pound as to the sixth. Payment by the drawer clearly does not extinguish the bill: Callow *v.* Lawrence, 3 M. & Selw. 95.

ERLE, C. J.—I am of opinion that the defendant is entitled to judgment. This was an action by the holders against the defendant as acceptor of certain bills of exchange; and the defendant has paid money into court. It appears from the special case which *has been stated for our opinion that the plaintiffs have received in respect of these bills full satisfaction in point of amount, viz. 20*s.* in the pound and interest. Now, when the holder of a bill of exchange has received the full amount of principal and interest, it is a somewhat startling proposition to say that he can maintain a further action upon it. Under some circumstances, unquestionably, it has been held, that, although he may have received the whole principal and interest, if the whole or a part of it has been received from other parties to the instrument, he may go on against the acceptor, not for his own benefit, but as trustee. The doctrine laid down by my Brother Byles in his book on Bills, 8th edit. 204, is this,—"It was long an unsettled question whether payment in part or in full by the drawer to the holder

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will discharge the acceptor pro tanto, or whether the holder may nevertheless recover the whole amount from the acceptor, and hold an equivalent to the amount received from the drawer as money received of the acceptor to the drawer's use. It has been thought that the holder can only recover of the acceptor the amount of the bill minus the sum paid by the drawer. The acceptor being the principal and the drawer the surety, it might seem that a payment by the drawer discharges the acceptor's liability to the holder pro tanto, and makes the acceptor liable to the drawer for money paid to his use, and that, if the drawer pay the whole bill, nominal damages only can be recovered by the holder of the acceptor. The better opinion, however, seems to be, that, to an action against the acceptor, payment by the drawer is no plea, but only converts the holder into a trustee for the drawer when the holder afterwards recovers of the acceptor. But, payment by the drawer of an *accommodation* bill is a complete discharge of the bill." It is upon that very peculiar *doctrine [*580 that the plaintiffs rely for the maintenance of this action. They admit that they have received all that is due to them upon the bills; but, inasmuch as part of the money was received from Cheesebrough & Son and part from Yewdall & Son, the respective drawers, they claim to be entitled to go on to recover those sums as trustees, in the one case for Cheesebrough & Son, and in the other for Yewdall & Son: and that makes it necessary to go into the circumstances of this case. It appears that these parties were engaged in trade transactions, and that the bills passed in the course of those transactions. In the year 1857 a pressure arose in the money-market; and, in consequence of that pressure, it became necessary for Cheesebrough & Son, Yewdall & Son, and the defendant to raise considerable sums of money in order to meet their engagements. This they did by the discount of bills: and, although these were not in the strict sense accommodation bills, where there is a total absence of consideration as between the drawer and the acceptor, the result of these transactions was that a very considerable amount of acceptances of the defendant were in the hands of Cheesebrough & Son as the drawers of one set of bills and of Yewdall & Son as the drawers of another,—the balance of account between them being greatly in favour of the defendant. Ultimately came a time of trouble, when all three suspended payment; and the plaintiffs, as the holders of the six bills in question, received from the defendant 16*s.* in the pound on the bills drawn by Cheesebrough & Son, and 14*s.* 5*d.* in the pound on the bill drawn by Yewdall & Son; and, after those sums respectively had been paid by the defendant as acceptor, Cheesebrough & Son, who were primarily liable on those bills as between them and the defendant, and who, if the account were taken between them, would be bound to pay them, pay 4*s.* in the *pound on those bills to the plaintiffs, making up the full [*581 amount due to them thereon; and Yewdall & Son's estate pays to the plaintiffs 5*s.* 7*d.* in the pound, Yewdall & Son being bound to find that money, and liable as between them and Lister for that money. It is under these circumstances that the plaintiffs require the defendant (Lister) to pay them over again that 4*s.* in the pound, in order that they may pay it back to Cheesebrough & Son, and the 5*s.* 7*d.* that Yewdall & Son paid them, in order that they may pay it back

to Yewdall & Son. It does seem to me that it would be most monstrous and irrational if the law should authorize Messrs. Bradbury & Cook thus to interfere in the concerns between Cheesebrough & Son and Lister and between Yewdall & Son and Lister, and compel Lister to hand over to them, Bradbury & Cook, these moneys under pretence of converting the latter into trustees on behalf of Cheesebrough & Son and Yewdall & Son, when in fact Lister has large claims against both of them. To a certain extent, the law as laid down in Byles on Bills is very reasonable. Where the drawer of a bill has been called upon to pay, it is more convenient that the holder should sue than the drawer should sue in his own name. In some of the cases it has been said that he may require the holder to go on and recover the money from the acceptor, and hand it over to him. It would certainly be neither irrational nor monstrous if that could be maintained: only, the position is rather a doubtful one that he is such a trustee as in equity could file a bill to compel payment of the money to him. Pownal *v.* Ferrand, 6 B. & C. 439 (E. C. L. R. vol. 13), 9 D. & R. 603 (E. C. L. R. vol. 22), where it was held that the endorser of a bill paying part of the amount to the holder may recover in an action against the acceptor the amount so paid, as money paid to his use, does not conflict with the doctrine
*582] in Callow *v.* Lawrence, 3 M. & Selw. *95, that, where a bill is made payable to the drawer's own order, and, on the acceptor's default, the bill is paid by the drawer, he may sue the acceptor upon it, or may put it in circulation again, so that any subsequent holder may recover the amount against the acceptor. But that is wholly foreign from the proposition we are now dealing with. Messrs. Bradbury & Cook are asking Mr. Lister to pay to them over again that which they have already received from Cheesebrough & Son and Yewdall & Son, in order that they may as trustees for those persons hand it back to them. Mr. Lister has a perfect right to answer that by saying that the balance of accounts between him and Cheesebrough & Son and Yewdall & Son is largely in his favour, and therefore it would be circuitous and wasteful to permit Messrs. Bradbury & Cook to recover the amount from him as trustees for parties who would be obliged immediately to pay it back to him. No doubt, the acceptor under ordinary circumstances contracts to pay the drawer 20*s.* in the pound. But, as regards the holder of the bill, if he receives full satisfaction from any quarter, he can only at the most have a cause of action against the acceptor for nominal damages. The authority which has been so much pressed upon us, viz. Jones *v.* Broadhurst, 9 C. B. 173 (E. C. L. R. vol. 67), appears to me to have gone very far beyond what could have been intended to be supported in any Court of law. Courts of law are instituted for the purpose of enabling a creditor to recover his debt, but not to enable him to recover more than his debt, and constitute himself trustee for a cestui que trust who has given him no authority for that purpose. In its adjudication, Jones *v.* Broadhurst does not appear to me to warrant the argument which has been founded on it. There, the holders sued the acceptor upon a bill of exchange: the acceptor pleaded, that, after the endorse-
*583] ment to the plaintiffs, and before action, the *drawers delivered to the plaintiffs and the plaintiffs accepted goods to an amount exceeding that of the bill, in full satisfaction and discharge of the bill

and of all damages and causes of action in respect thereof, and that the plaintiffs held the bill against the will and consent of the drawers, and commenced and prosecuted the action against such will and consent: and I call it rather a judgment on the ground of special demurrer; for, as I understand it, the first impression of the Court was, that the plea would have been a good answer if it had alleged that the goods were handed over by the drawers in satisfaction of the holders' claim against all parties to the bill. "The question," says the Chief Justice, "is, whether this plea,—whether it is a valid and sufficient plea or not,—means to allege that the drawers gave to the plaintiffs, at their request, and that the latter accepted, the goods in the plea mentioned, in satisfaction of the bill, and of all damages and causes of action in respect thereof against any of the parties thereto; or, in other words, whether it means that the goods were delivered and accepted in extinguishment of all right of action of the plaintiffs upon the bill. It is true that the goods might have been given, not in satisfaction and discharge of the bill generally, but in discharge of the liability of the Cooks (the drawers), and in respect of the causes of action by the plaintiffs against *them*. I do not think that that is the fair meaning of the plea; but I think it means that the goods were delivered in satisfaction and discharge of all damages and causes of action in respect of the bill, whether against the Cooks or against any other parties to it." He then proceeds to consider whether, so understanding the plea, the finding of the jury (for the defendant) was warranted by the evidence: and he concludes what may be called the interlocutory part of his judgment in these words,—*"Whether [*584 or not enough is disclosed on the face of the plea to make it enure as a defence, is a matter of more difficulty; and upon that, and the authorities cited, we will take time for deliberation." And then came the elaborate judgment, which has been the subject of so much comment, and, I may add, misunderstanding, that the plea was no bar to the plaintiffs' right to recover against the acceptor on the bill. The substance of the judgment is, that there is no allegation that the goods were delivered in satisfaction of the claim of the holders against the acceptor. In the present case, the payments made by Cheesebrough & Son and Yewdall & Son were beyond all question made in satisfaction pro tanto of the claim of the plaintiffs as against all parties to the bills. I cannot help observing that the great accumulation of learning displayed in that case does not logically apply to the point in judgment. Something is thrown out about the plaintiffs suing as trustees for the drawers; but that is wholly beside the matter the Court there had to adjudicate upon: and in my judgment the case is altogether distinguishable in its facts and circumstances from the present. Randall *v.* Moon, 12 C. B. 261 (E. C. L. R. vol. 74), is also plainly distinguishable. It was a case which in the early part of my professional life was of constant occurrence. The holder of a bill of exchange brought actions contemporaneously against the drawer and the acceptor, and, it being uncertain which of them would be available, he took his verdict and judgment against both. It so happened in that case that the drawer obtained a judge's order for a stay of the proceedings in the action against him, on payment of debt, interest, and costs: and the question was whether the payment under that order

could be pleaded in bar of the further maintenance of the action
*585] against the acceptor, as a payment in *satisfaction and discharge of the causes of action against him, or relied on as a ground for reduction of damages. The Court held that it could not. They probably thought there was some other recourse. It might be that the plaintiff would have to hand over the money to the drawer, when recovered: but the judgment is, that the acceptor could not rely upon the payment by the drawer either as an answer to the action or as a ground for reducing the damages to a nominal sum. I do not therefore think that that case at all stands in our way. The substance of the present case I take to be this, that the plaintiffs, the holders of the bills in question, have recovered from the other parties primarily liable on these bills every farthing that they are entitled to receive: and it would in my judgment be a perversion of the law to hold that they may maintain an action against the acceptor, in order to enforce some imaginary trust on behalf of somebody else.

WILLIAMS, J.—I also am of opinion that the defendant is entitled to our judgment on this special case. There are certain propositions of law involved in this case which, I apprehend, cannot be controverted in this Court, or in any Court except a Court of error. I consider that the case of Jones *v.* Broadhurst, 9 C. B. 173 (E. C. L. R. vol. 67), which was very maturely considered, has established the general proposition, that, to an action against the acceptor of a bill of exchange, payment by the drawer is no plea. It may be right to consider what is the principle on which the Court arrived at that conclusion in the case of Jones *v.* Broadhurst. It must be admitted that the case, as reported, is somewhat obscure; because at the outset it would seem that the Lord Chief Justice and Mr. Justice Coltman con-
*586] sidered the plea good. The action was by the *holders against the acceptor of a bill of exchange for 49*l.*, and there was a plea setting up by way of satisfaction of the causes of action the delivery to them by the *drawers* of goods to the amount of 50*l.*; and the inclination in the minds of at least two members of the Court before they took time to consider, was, that the true meaning of the plea was that the goods were delivered and accepted in full satisfaction and discharge of the liability of every party to the bill, and that the only point left to be considered, was, whether satisfaction by a stranger was an answer to the action. Upon this point the Court took time to look into the authorities; and very fully they were looked into by Lord Truro, who, with his characteristic diligence, reviewed all the cases bearing even remotely upon the subject. In the result, the Court seem to have altered their minds as to the effect of the plea; for, at the beginning of that very elaborate judgment, which, though delivered by Mr. Justice Cresswell, is well known to have been written by Lord Truro, they say: "The plea does not allege whether such satisfaction was given and accepted before or after the bill became due; nor is it averred to have been at the request or for or on behalf of the defendant, or in satisfaction of his liability upon the bill, or of the cause of action of the plaintiffs against him: nor does it in any way connect the defendant with the transaction, or show any privity between him and the parties to the satisfaction given, except so far as such parties were the drawers of the bill and the defendant was the

acceptor. As the plea did not allege that the satisfaction was made at the request or for or on behalf of the defendant, or in respect of the cause of action stated in the declaration, the defendant was not required to give any evidence to such effect, to entitle him to the verdict he obtained; and therefore the verdict will not warrant an *intendment of any such facts, or of any other fact tending to extend [*587 the import of the plea as stated upon the record: and the question raised by the plea, according to its terms, is, whether satisfaction of a bill as between a drawer or endorser and an endorsee, made before or after the bill becomes due, enures as a satisfaction on behalf of the acceptor, and operates to discharge *him* from liability to the endorsee." And further on they say,—"Upon the record in this case, the bill must be taken to have been a bill accepted for value, and which the acceptor therefore ought in all events to pay; and, having received value, it is difficult to discover any valid reason why he should be discharged from his liability to make the payment which for value he has contracted to make, by reason of any arrangements between others, to which he is no party, in which he is not shown to have interfered, or his rights and liabilities are not shown to have been in the contemplation of the parties to any such arrangement, and by which his interests are not in any respect compromised or affected. The terms of the plea do not import that the satisfaction was made upon any contract or condition, either that the bill should be delivered up or be deemed to be satisfied as between the plaintiffs and the acceptor: and, when the nature of the relation in which the respective parties stand towards each other is considered, no principle is apparent upon which, as a consequence of law, the satisfaction of a bill as between the endorsee and the drawer should operate as a satisfaction and discharge in favour of the acceptor." For these reasons, they held that the plea in that case afforded no answer to the plaintiffs' claim. The principle on which the decision is founded, no doubt, was, that, there being from the nature of the transaction a vested right of action in the holders against the acceptor, that *right [*588 of action, according to the ordinary rule of law, could only be got rid of by a release or an accord and satisfaction. There must be the one or the other. The point which was left undecided in Jones *v.* Broadhurst, although the authorities were collected, came again before this Court in Belshaw *v.* Bush, 11 C. B. 191 (E. C. L. R. vol. 73). There, to debt on simple contract for goods sold and delivered, work and labour, &c., the defendant pleaded, "as to 33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action in respect thereof," that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the plaintiff drew a bill on C. for 33*l.* 10*s.*, payable to the plaintiff's order three months after date; that C. accepted the bill, and delivered it to the plaintiff, and the plaintiff received it, for and on account of the said sum of 33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action in respect thereof; and that the plaintiff endorsed and delivered the bill to one D., who was before and at the time of the commencement of the suit the holder of the bill, and entitled to sue C. thereon. And it was held that the giving of the bill by C. must be taken to be a conditional payment on

behalf of the defendant; that, the condition to defeat it not having happened, it operated as an absolute payment; and that it might be, and had been, adopted by the defendant in his plea, and consequently that it barred the action. I only allude to that case because my late Brother Maule, in the course of delivering the laborious and learned judgment which he pronounced on that occasion,(*a*) refers to Jones *v.* Broadhurst. What he says of that case is,—"The declaration
*589] *shows debts and goods sold and delivered, &c., by the plaintiff to the defendant: and it is not to be presumed that there were any other causes of action in respect of such debts than those of the creditor against the debtor. In this respect the plea differs from that in Jones *v.* Broadhurst, where the action was by the endorsees against the acceptor of a bill of exchange, and the plea stated that the drawers delivered to the plaintiffs, and the plaintiffs accepted, divers goods, in full satisfaction and discharge *of the bill of exchange*, and of all damages and causes of action in respect thereof; and the Court held that the drawers, being parties to the bill, and consequently liable to pay it, the satisfaction and discharge mentioned in the plea must be understood to apply to the liability as drawers of those who delivered the goods, and not to that of the defendant as acceptor." I apprehend that the principle of that case, at all events, was confirmed in the subsequent case of Randall *v.* Moon, 12 C. B. 261 (E. C. L. R. vol. 74); and that the general proposition established by those authorities, is, that, to an action against the acceptor of a bill of exchange, payment by the drawer is no plea. To that proposition a qualification has also been established, viz., that which is laid down in my Brother Byles's book on Bills, p. 205, that "payment by the drawer of an *accommodation* bill is a complete discharge of the bill." Now, it is not necessary to decide it in this case; but I must confess that I have some doubt whether that proposition, thus generally laid down, is quite correct, unless you add to it, supposing that the holder has notice at the time the payment is made to him that the bill is an accommodation bill. The foundation for my doubt is this. I have already attempted to show that the reason why it was held in Jones *v.* Broadhurst, that, in an action against the acceptor,
*590] payment by *the drawer is no plea, was, that the Court considered it could not be regarded that the money had been paid and received in satisfaction of the claim as against the acceptor: and it is quite obvious, that, in order to make a good accord and satisfaction, you must have the assenting minds both of the person who pays or delivers and of the person who receives the money or the goods. My difficulty consists in seeing, if the holder is not aware when he receives the money from the drawer that the bill is an accommodation bill, how he can be regarded as having received the money in satisfaction of his claim as against the acceptor. If he knows that it is an accommodation bill, then he knows that virtually the drawer is the acceptor, that is to say, the person on whom the ultimate liability to pay the bill rests. The doubt I have just mentioned is confirmed by what took place in Randall *v.* Moon, because there, an attempt being made to set up the payment of the money under the Judge's order in

(*a*) Mr. Justice Williams, though present at the argument of Belshaw *v.* Bush, was understood not to have been an assenting party to the judgment.

the action brought against the drawer, in the action against the acceptor, it being urged that it was an accommodation acceptance, Jervis, C. J., says: "It seems to me that the payment and acceptance of the money under the Judge's order in the action by the plaintiff against Turner, the drawer,—the plaintiff having no notice that Moon was an accommodation acceptor,—cannot be considered as a payment on behalf of the acceptor, or an acceptance in satisfaction and discharge of the causes of action against the acceptor, because a right of action for damages had vested at the time." However, although I thought it right to express the doubts I feel on that, it is, as it seems to me, not material to decide how the law is with reference to that point, because, assuming that the action can be maintained by the holder against the acceptor, notwithstanding the payment made by the drawer, whether a total or a *partial payment, the question remains to be considered what is the amount of the [*591 damages that are recoverable under such circumstances. Now, where the bill is not an accommodation bill, that is to say, where the acceptor is the person out of whose pocket the money to meet the bill is to come, it may very properly be held, as it was held in Jones *v.* Broadhurst, that, notwithstanding the partial payment by the drawer, the holder may recover the whole sum against the acceptor, because *he* is the person who is ultimately liable to pay the whole, and that, when the holder has so recovered the whole sum, he shall be held to have received the difference between what he received from the drawer and the amount recovered from the acceptor, as a trustee for the drawer. But a totally different consideration arises, where, by reason of the bill being an accommodation bill, it is impossible to look at the holder, supposing he was allowed to recover the whole amount, as holding the excess as trustee for the drawer. Therefore it seems to me, that, at all events where it appears that the bill is an accommodation bill, even supposing the plaintiff, the holder, had no notice of that fact at the time he received the payment from the drawer, that payment must be taken in mitigation of damages, and that the plaintiff, the holder, can recover no more than the difference between the amount of the bill and that payment. If that be so with respect to an accommodation bill, it follows that, in principle, it must be the same in all cases, where, supposing the holder to recover the full amount of the bill, the state of things between the acceptor and the drawer is such that it would be contrary to justice to suppose that the money so recovered could be held by the plaintiff as trustee for the acceptor. In such a case as that, I think it is plain that the payment ought to be allowed in *reduction of damages. Applying those [*592 principles to the present case, looking at all these circumstances, and taking into consideration the sum paid into Court, it is clear that enough has been paid in to satisfy all the damages, and that the defendant is entitled to judgment.

WILLES, J.—I am of the same opinion: and I desire to express my entire concurrence in the opinion expressed by my Brother Byles in the 8th edition of his book, p. 158,—"After a partial payment, at maturity, by the acceptor, or any other party really the principal debtor, the holder cannot recover of the acceptor more than the balance." I apprehend that that is good sense and good law: and it

is only necessary to bear in mind one or two of the elementary principles of the law relating to bills of exchange, for the purpose of being satisfied that it is good law. Its good sense is obvious. Bills of exchange, as everybody knows, rest on peculiar considerations. Their most peculiar incident is, that they pass by endorsement, giving rights of action to successive holders for value. That which appears to me to be equally elementary, is this, that the holder of a bill of exchange is entitled to no more than the amount of principal and interest due upon the bill: he is entitled to receive payment of the bill at maturity from some person interested in paying it; and, if it be not then paid, to interest and expenses if any, subject to this, that, if the case goes to a jury, they may if they think proper abstain from giving interest. This is the utmost claim that the holder of a bill of exchange has upon any party to the bill; and, upon such claim being satisfied by any party to the bill, the right of the then holder ceases, and the right to the bill reverts to the payer, to use such recourse upon it as he may have. If I am told that there *593] *is any law that the holder of a bill of exchange, who has received,—say, from the sixth endorser,—the amount of the principal, with interest to the date of payment, and lawful expenses, if any, is entitled besides to sue each of the prior endorsers for nominal damages, I say that that is a proposition which is absurd in its statement, and which has no existence in the custom of merchants. That is the proposition which the plaintiffs must maintain in order to succeed. After payment by the drawer to the holder of the amount which he is entitled to receive upon the bill, the drawer is the person who is entitled to the bill, and to sue upon it. The strict doctrine of accord and satisfaction after breach is in my judgment inapplicable to bills of exchange, because, by the custom of merchants, which is part of the law of all commercial countries, a bill of exchange, even after breach, may be discharged without accord and satisfaction, by the assent of the holder: it is only necessary that he should assent to his having no longer a claim upon the bill. A very remarkable case of that kind occurred some time ago, where a person, having lent a large sum of money to a relative, took by way of security a promissory note, and, before his death, being desirous that his relative should not be called upon to pay the note (which was then overdue), gave him a receipt in full as on payment of the bill, but without receiving the money. After his death, his executors, alleging that accord and satisfaction was necessary for the purpose of discharging the liability of the maker of the note after it had become due, brought their action to recover the amount. Lord Campbell, at Nisi Prius, and the Court of Exchequer afterwards, held that the doctrine of accord and satisfaction was inapplicable, and that there was a sufficient discharge by the testator having in his lifetime, though after *594] *the bill became due, expressed his intention not to sue upon it. The law upon this subject is referred to in my Brother Byles's book on Bills, p. 182. Therefore it should seem that bills of exchange are to be dealt with, not according to the technical rules with respect to accord and satisfaction, but with reference to the question whether the holder has got that which he is entitled to upon the bill,—his principal and interest and lawful expenses, if any.

That is the case with reference to the entire payment: and I desire to add, that it appears to me to be perfectly indifferent whether the payment is made by the debtor or by a stranger. One of the doctrines laid down in Jones *v.* Broadhurst (perhaps not necessary for the decision of the case: if it were, I might not have ventured to express an opinion in opposition to it) is this,—If a stranger pays A.'s debt, A. not knowing of it, and therefore not assenting to it, until he assents to it it is no payment of the debt at all, but the creditor, having received the whole amount, may recover it again against the debtor. I desire to say that I do not, as at present advised, assent to that proposition. It appears to me to be contrary to a well-known principle of law. It is contrary to the rule of the Civil law, "Debitorem ignarum seu etiam invitum solvendo liberare possumus." And the authorities in this country before the suggestion was made in the case referred to, consisted of one case in Croke, and the same case in Rolle, who are opposed to one another; one of those learned personages having inserted a "not," which the other omitted,—the one saying that it is a discharge, and the other that it is not. I apprehend it is also contrary to the well-known rule of mercantile law as to payment; because, if the debtor pays a portion of the debt, it does not enure as a discharge of the whole, though so agreed, but, if a *stranger pays a part of the debt in discharge of the whole, the debt is gone, because it would be a fraud on the stranger to [*595 proceed. So, in the case of a composition made with a body of creditors, the assent to receive the composition discharges the debt, because otherwise fraud would be committed against the rest of the creditors. And, with respect to the necessity for showing the assent of the debtor, I apprehend that it is contrary to the well-known principle of law, by which a benefit conferred upon a man is presumed to be accepted by him, until the contrary is proved. If assent were necessary, and the invitum of the Civil law is to be excluded from ours, then I say, that, according to familiar authorities, one of which is the case of Atkin *v.* Barwick, 1 Stra. 165, so often referred to, the assent of the debtor ought to be presumed. I own I look with very great caution and distrust at the path which I am invited to tread, and at the first step of which I am obliged to adopt the affirmative of propositions which, according to my best judgment of the state of the law, appear to me not to be the orthodox. There are, no doubt, different considerations applicable to the case of payment of part of the debt. If the whole debt be paid, the proper conclusion I should have thought was, that the right reverts to the person who has paid it. The case of Randall *v.* Moon, 12 C. B. 263 (E. C. L. R. vol. 74), I apprehend, may well be consistent, on the ground that there the payment under the Judge's order was not a payment of the whole debt, or taken as such, because costs had been incurred in the action against the acceptor, and they had become part of the right of the holder of the bill, as accessory to his principal debt; and it did not appear that he intended to waive those costs, but might well intend, as he had a right to do, to go on with the action to recover them. And it would be unjust if it were not so. In the case of the payment of a *part of the debt, I can well understand, that, if the creditor has fairly incurred costs, such part payment ought not to be any [*596

answer to his action. But, if it be no answer to his action, is the payment not to be allowed in mitigation of damages? I apprehend, that, where the whole debt is paid, the payment clearly ought to be allowed in bar or in mitigation as the case may be: but, when part only is paid, the further inquiry may be necessary, whether the payer had any recourse against the defendant. There is a class of cases to which reference ought to be made for the purpose of determining this latter question. I mean cases in which an attempt has been made to endorse a bill for part,—where an endorsement is made, not as on a sale of the bill, but for an advance of part of the money only, yet with an intention of transferring the rights on the bill to the endorsee. There, where the endorsee gets the right to recover the whole of the money, he is necessarily a trustee so to speak for the endorser for the amount he receives beyond the sum he advanced. That was the case of Reid *v.* Furnival, 1 C. & M. 538,† referring to the case of Johnson *v.* Kennion, 2 Wils. 262, in which it is so laid down. The whole right of action passes to the endorsee, who is necessarily a trustee to the extent of the sum exceeding that which he has advanced upon the bill: and it may be, where part of the sum is paid upon the bill, that the same rule ought to apply. Certainly I apprehend that it ought not to apply, unless there be no other mode of doing justice between the parties. Why the aid of the Court of Chancery is to be invoked for the purpose of settling the rights of the parties on bills of exchange, I am quite unable to see: and the Lord Chief Justice has referred to the case of Pownal *v.* Ferrand, 6 B. & C. 439 (E. C. L. R. vol. 13), 9 D. & R. 603 (E. C. L. R. vol. 22), which shows that recourse to that jurisdiction is unnecessary even in the case of the intentional endorse-
*597] ment for partial consideration. The expression, *"he is a trustee for the rest," does not mean that there is such a trust as must be enforced in the Court of Chancery. I should think that an action for money had and received would lie the instant the endorsee received more than he was entitled to, as in Pownal *v.* Ferrand an action for money paid was held to lie. That may be an easier solution of the matter than to say that an ordinary transaction upon a bill of exchange must be made the subject of a bill in Chancery. When it was said, by Bayley, B., in Reid *v.* Furnival, that the endorsee was to be considered as a trustee for the person entitled to the remainder of the money, after deducting the amount that he had advanced, that meant no more than that the beneficial interest would be in the endorser, not that a bill in Chancery must necessarily be filed for the purpose of enforcing his rights. I apprehend it is not a trust exclusively for the Court of Chancery, but a confidence arising out of a contract in a mercantile transaction, from which the law implies a promise on the part of one who is liable to pay money to another. The principal debtor on a bill of exchange primâ facie is the acceptor, and then the drawer and the endorsers in the order in which their names appear upon the instrument. But the Court is bound to listen to evidence to show that the person who does not so appear upon the face of the bill is in truth the principal debtor: and that, as it seems to me, is the position in this case of Messrs. Cheesebrough & Son in respect of five of these bills, and of Messrs. Yewdall & Son as to the bill to which they are parties.

KEATING, J.—I entirely agree in the judgments given by my Lord and my Brother Willes. Judgment for the plaintiffs.

The principal case goes the length of overruling Randall *v.* Moon, *supra*, inasmuch as it decides that an action cannot be maintained by the holder of a bill of exchange, without notice that it was an accommodation bill, against the acceptor after payment by the maker. Mr. Justice Williams displays in his opinion the advantage which a thorough mastery of the technical principles of law gives to a Judge. This knowledge enabled him to apply technical rules in harmony with the dictates of sound reason and yet with finished accuracy. He thus avoids the scandal of contributing to disturb a series of adjudications which, whether settled wisely or unwisely, served to give stability to the law regulating commercial paper. He points out the mode in which prior decisions might remain unimpaired, and the principal case determined nevertheless substantially in accordance with the opinion of the majority of the Court. This, as he shows, could be done by allowing the action, whilst denying anything more than nominal damages to the plaintiff. Jones *v.* Broadhurst, *supra*, would then stand and govern cases where the acceptor is ultimately and wholly liable to discharge the bill, and Randall *v.* Moon and the principal case would obtain either in the case of a pure accommodation bill, or where the accounts were such as to throw partially or totally the ultimate liability upon the drawer.

This series of cases presents a novel application of the doctrine that a vested right of action can be barred only by a release or an accord and satisfaction. That common law doctrine has been pronounced by high authority inapplicable to the law merchant, which is based upon the civil law where it is unknown: Foster *v.* Dawber, 6 Exch. (1851) 839; Byles on Bills, 6th Am. ed. 153. No allusion is made in the principal case to any such limitation in extent of the doctrine, though that restriction would have furnished the strongest ground upon which to attack the decisions which were animadverted upon.

From the absence of cases it may be inferred that the American Courts have not applied the doctrine under such circumstances. Yet the doctrine itself is acknowledged: Mathis *v.* Bryson, 4 Jones (N. C. 1857) 508; Clarke *v.* Hawkins, 2 Ames (R. I. 1858) 219; Warren *v.* Skinner, 20 Conn. (1850) 559; Rose *v.* Hall, 26 Conn. (1857) 392; Jones *v.* Perkins, 7 Cushman (Miss. 1857) 139; Brown *v.* Cambridge, 3 Allen (Mass. 1861) 474. Whether the doctrine obtains in Pennsylvania or not, and how far it prevails in Maine, see 3 Am. Law Register N. S. (1863) 65.

*598] *THE DUKE OF BEAUFORT *v.* LORD ASHBURNHAM.

Jan. 17.

1. The master having, on a taxation as between party and party, allowed 105*l.* as "instructions for brief," though the witnesses were not very numerous or the brief very long, the Court declined to interfere with his discretion, —the questions involved in the trial being complicated and difficult.

2. In an action involving the title to a manor, an antiquarian's charges for searches for and translations of ancient records and documents at the record office and elsewhere (which were known to exist), were allowed.

3. Costs of examining a very old witness upon interrogatories shortly before the trial, were allowed, although he was able to attend and did attend at the Assizes, but was not examined; and, by reason of his age and infirmity, the expenses of his son's journey and attendance upon him at the Assizes were also allowed.

4. Short-hand notes not allowed as between party and party.

THIS was an action brought to try the title to certain waste lands in the county of Brecon. The cause came on for trial at the last Summer Assizes for the county of Brecon, and, after occupying three days, was adjourned to the 27th of October; but, in the mean time, it was agreed that a verdict should be taken for the plaintiff for 40*s.* damages.

Upon the taxation of the plaintiff's costs, the following items of charge were objected to on behalf of the defendant, but allowed by the Master, viz. 105*l.* for "instructions for brief,"—68*l.* 8*s.* 5*d.* for searches for and translations of ancient documents in the record office and elsewhere by Mr. Hewlett, the antiquarian,—37*l.* 17*s.* 7*d.* for the costs of the examination of an old witness upon interrogatories under the 1 & 2 W. 4, c. 22,—and 18*l.* for a copy of the short-hand notes of the trial in July.

Hance, on a former day in this term, moved for a rule calling upon the plaintiff to show cause why the Master should not be at liberty to review his taxation in these respects. 1. As to the sum allowed for "instructions for brief," he submitted that that was an excessive allowance, seeing that the brief only consisted of forty-eight sheets, and the witnesses numbered only thirty-five, and that 12*l.* in addition was allowed for abstracts of documents, which in truth formed the instructions. 2. Then, as to Mr. Hewlett's expenses for searches and
*599] translations,—these, it was *contended, were necessarily incurred by the plaintiff in looking up evidence to support his case, and ought not to be allowed in a taxation between party and party. [ERLE, C. J.—The searches, I am informed, were not made for the purpose of ascertaining whether such evidence existed. But the documents were known to exist; and the services of the expert were required to trace them out and put them in a form to be presented before a jury. Master *Gordon* informed the Court that similar charges had been allowed in the Exchequer.] 3. The witness Rumsey being nearly eighty years of age, and infirm, it might have been a very prudent thing on the part of the plaintiff's attorney to take his examination upon interrogatories; but there is no reason why that expense should be cast upon the defendant; especially as Rumsey did in fact attend at the Assizes (though he was not examined), and the Master has allowed the costs of his attendance and journey, and also the expenses of his son, who merely accompanied his father to the Assizes for the purpose of taking care of him. [ERLE, C. J.—What

does the statute say about these costs?] The 9th section of the 1 & 2 W. 4, c. 22, provides "that the costs of every rule or order to be made for the examination of witnesses under any commission or otherwise by virtue of this Act, and of the proceedings thereupon, shall (except in the case hereinbefore provided for) be costs in the cause, unless otherwise directed either by the Judge making such rule or order, or by the Judge before whom the cause may be tried, or by the Court." In Curling *v.* Robertson, 2 D. & L. 337, it was held, that, if the interrogatories are not given in evidence, the costs of them will not be allowed. 4. As to the short-hand notes, the universal practice is, not to allow them as between party and party, in the absence of an agreement between the parties.

*ERLE, C. J.—We all think, for the reason stated, that Mr. Hewlett's charges were properly allowed. As to the instructions for brief, expenses of examination of Rumsey upon interrogatories, and the short-hand notes, we will confer with the Master. [*600

Cur. adv. vult.

ERLE, C. J.—This was an application to the Court for a review of the Master's taxation. There were four grounds of objection urged by Mr. *Hance*. The first was, that the large sum of 105*l.* was allowed for "instructions for brief." Doubtless that seems to be a very unusually large sum to allow. We have conferred with the Master; and, having seen the great trouble and expense that was necessarily incurred in ascertaining and defining the manorial and other rights between the noble litigants, we are not satisfied that the allowance was an unreasonable one.

The next complaint was, that a sum of 68*l.* 8*s.* 5*d.* has been allowed for the expenses of searches for and translations of ancient records and documents in the record office and elsewhere, by Mr. Hewlett. This, it is said, was searching for evidence of the plaintiff's case, and ought not to be allowed against the defendant upon a taxation of costs as between party and party. If this had been, as suggested, a charge for searches made to discover evidence to support the plaintiff's case, it would not have been allowed: but it appears that the documents in question were records relating to the manor, the existence of which was well known, and which were necessary and pertinent to the issue to be tried. It was, therefore, an expense that was necessarily and properly incurred, and the Master was right in allowing it.

The third complaint was as to a charge of 37*l.* 7*s.* 7*d.* *for the examination upon interrogatories (in April) of one Rumsey, a witness who attended at the trial, but was not then examined. It appears that this person was nearly eighty years of age, and very infirm, and that, his evidence being important, the plaintiff's attorney thought it advisable to take his examination lest he should not live until July so as to be able to give evidence at the trial. It appears also that this witness did attend at the trial, though he was not examined then; and that the Master has allowed the costs of his attendance at the Assizes, and also the expenses of his son, who came with him in order to take care of him, his infirm condition rendering such attendance indispensable. We have felt some doubt and difficulty about this item. But, in the result, we think the Master was justified in allowing the costs of this witness's attendance at the trial; and [*601

considering his age and infirmity, we think it not unreasonable that he should have the comfort and attendance of his son on his journey. But, was the attorney justified in taking the witness's examination beforehand? The Master reports to us that this was entirely an act of prudence and discretion. That may well be, and yet it may not be right that the expense should be thrown upon the opposite party. The 9th section of the statute which regulates the examination of witnesses upon interrogatories, 1 & 2 W. 4, c. 22, enacts "that the costs of every rule or order to be made for the examination of witnesses under any commission or otherwise by virtue of this Act, and of the proceedings thereupon, shall (except in the case hereinbefore provided for) be costs in the cause, unless otherwise directed either by the Judge making such rule or order, or by the Judge before whom the cause may be tried, or by the Court." We have, therefore, a discretion over these costs: and I am clearly of opinion that it was
*602] *an act of commendable prudence on the part of the attorney to have the evidence of Rumsey perpetuated, and that the Master would not under the circumstances have been justified in refusing to allow these costs.

The remaining objection, and, though the least material, one which is of some importance as tending to introduce a novel practice, is, that the Master improperly allowed the cost of one copy of the short-hand notes. It was probably a very prudent and useful thing to have these notes for the use of counsel: but, as a uniform rule, they must be paid for by the party himself, and cannot be charged to his opponent. We think that item, amounting to 18*l.*, should be disallowed. Upon that, therefore, the rule may go, unless the plaintiff will consent to strike off that item. Rule accordingly.(a)

(a) No rule was drawn up, the objectionable item having been struck off by consent.

*603] *JOHN ANDERTON, Appellant; ISAAC RIGBY, Respondent. *Jan.* 26.

By a by-law made by the Birkenhead Improvement Commissioners under the Local Government Act, 1858, it is provided that "every building to be erected and used as a dwelling-house shall during such use have in the rear or at the side thereof an open space exclusively belonging thereto to the extent of at least 150 square feet, free from any erection thereon above the level of the ground, other than a privy; but, where there is a water-closet, and no other privy, an open space of not less than 100 feet may be allowed; and the distance across such open space between every such building and the opposite property at the rear or side, exclusive of any common passage, shall be ten feet at least: if such building be two stories in height above the level of such open space, the distance across shall be 15 feet; if such building be three stories, it shall be 20 feet; if more than three stories, 25 feet:"—

Held, that the space required to be left between the building to be erected and the opposite property must be co-extensive with the line of demarcation between such building and such opposite property, and that at no point should a less distance than that prescribed by the by-law intervene between them, exclusive of any common passage.

THIS was a case stated by two of Her Majesty's justices of the peace in and for the county of Chester, for the opinion of the Court under the provisions of the statute 20 & 21 Vict. c. 43.

Whereas, certain by-laws were made, and passed by the Birkenhead Improvement Commissioners, under the Local Government Act, 1858

(21 & 22 Vict. c. 98), on the 25th of March, 1862, and confirmed by one of Her Majesty's principal secretaries of state on the 28th of May, 1862, "with respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof," with respect (amongst other requirements) to the sufficiency of space about buildings to secure free circulation of air, and with respect to the ventilation of buildings, and which for the purposes of this case are admitted to have been duly made and confirmed.

The 39th by-law relates to the space about buildings, and is in the following words,—"Every building to be erected and used as a dwelling-house shall during such use have in the rear or at the side thereof an open space exclusively belonging thereto to the extent of at least 150 square feet free from any erection thereon above the level of the ground, other than a privy; but, where there is a water-closet, and no other privy, an open space of not less than 100 feet may be *allowed; and the distance across such open space between every such building and the opposite property at the rear or [*604 side, exclusive of any common passage, shall be 10 feet at least: if such building be two stories in height above the level of such open space, the distance across shall be 15 feet; if such building be three stories, it shall be 20 feet; if more than three stories, 25 feet. When, however, thorough ventilation is secured, or when, on the rebuilding of houses, these dimensions cannot be adhered to without considerable sacrifice of property, they may be modified in special cases, at the discretion of the commissioners." And whereas, at a petty sessions holden at Birkenhead in and for the hundred of Wirrall, in the county of Chester, on the 11th of September, 1862, an information preferred and made on the 8th of September, 1862, by Isaac Rigby, assistant building surveyor of the Birkenhead Improvement Commissioners, against John Anderton, of Wavertree, in the county of Lancaster, brewer (hereinafter called the appellant), under the said article or by-law 39 of the said by-laws, charging for that he the said John Anderton, on the 6th of September, 1862, at the township of Birkenhead aforesaid, without the sanction or approval of the Birkenhead Improvement Commissioners, did erect and use as a dwelling-house a certain building having in the rear or side thereof an open space of less than 100 feet, such building being more than three stories in height above the level of such open space, and having a distance across such open space between the said building and the opposite property at the rear or side thereof (exclusive of a certain common passage) of less than 25 feet, contrary to a certain by-law duly made, confirmed, and published under the authority and provisions of the Local Government Act, 1858, and which said by-law was at the time of the *commission of the said offence, and still was in force, contrary to the form of the statute in such case made [*605 and provided, was heard and determined by them, the said parties respectively being then present: and, upon such hearing, the appellant was duly convicted before them of the said offence, and they adjudged him to forfeit and pay for the said offence the sum of 40*s.* and costs. And whereas, the appellant being dissatisfied with their determination upon the hearing of the said information, as being erroneous in point of law, demanded a case for the opinion of this Court.

Upon the hearing of the information, it was proved on the part of the defendants, and found as a fact, that the part of the building erected and numbered 1 on the plan hereto annexed was more than three stories high; that the part numbered 2 on the same plan is a billiard-room attached to it, and is one story high; that the super structure of both has been built since the by-laws referred to in the said information were confirmed; that the billiard-room extends to the verge of a common passage at the back of the land built on by the appellant; that there is a water-closet but no privy in the house so erected; and that there is an open space of 106 feet on the south side of the billiard-room, the extremity of which open space does not face any portion of the opposite property. It was also proved, and found as a fact, on behalf of the appellant, that the adjoining property is house property; and that there are no windows in it, and therefore the want of an open space would not affect it to so great an extent; that cellars were built under the part numbered 1 before the by-laws came into operation; and that plans were sent in for the present building so far as regards the building above the cellars, but were rejected, on the ground maintained by the respondents.

*606] *On the hearing of the said information it was admitted,—first, that the building numbered 1 upon the plan is a separate building, unconnected with the Castle Hotel,—secondly, that it was erected and used as a dwelling-house within the meaning of the by-laws, subsequent to the confirmation of the by-laws, subject to the fact of the existence of the cellars previous to such confirmation.

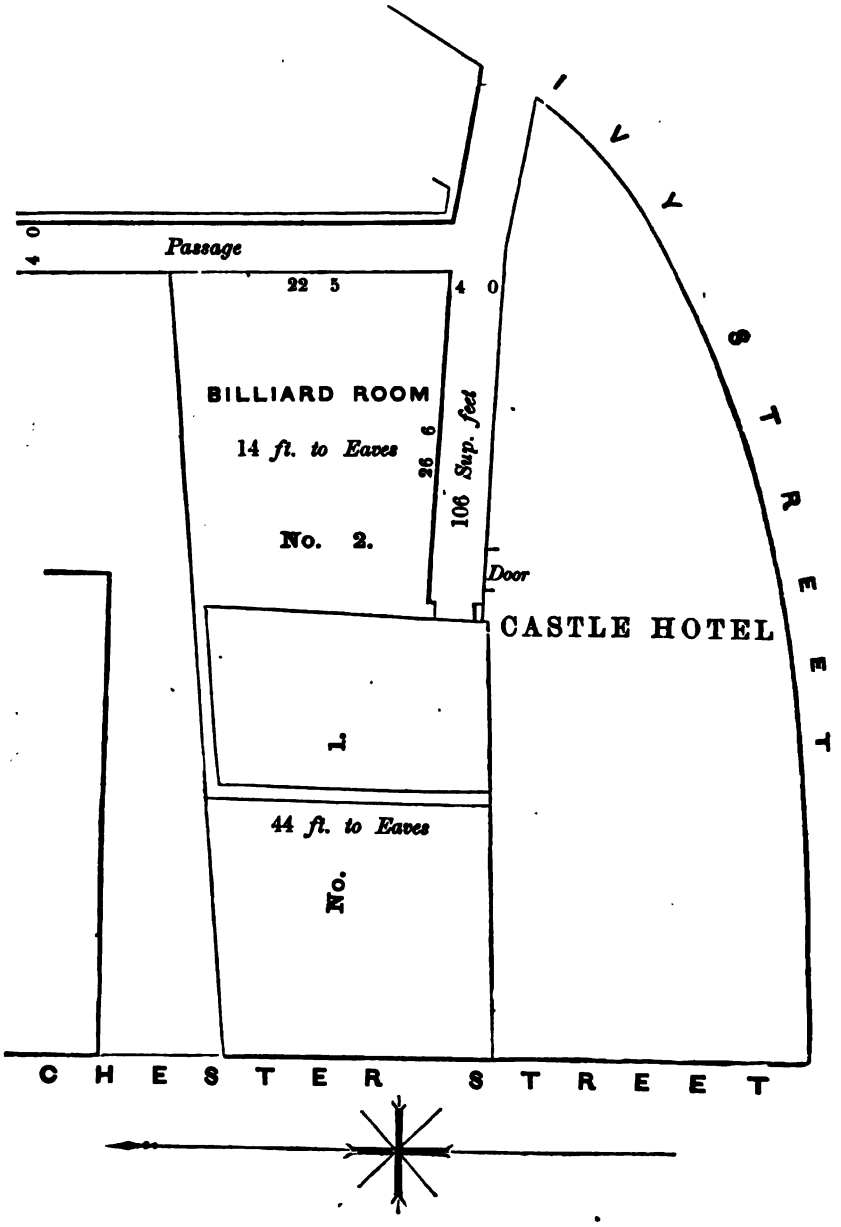
It was contended, on behalf of the appellant, that, as there is a water-closet attached to the said building, and as a thorough ventilation thereof was (it was alleged) secured, he had complied with the said by-law No. 39 in providing at the rear of some part of the building a space of not less than 100 feet (as a matter of fact 106 feet) there being between the rear of some part of such building and the opposite property at the rear, exclusive of any common passage, a distance of at least 25 feet; and that the by-law does not require a clear distance of at least 25 between the furthest projection of any such building and the opposite property and the rear exclusive of any common passage; as, if that were the case, where a person was the owner of a piece of land only 40 feet deep, on which he desired to erect a building more than three stories high, then he would be limited to erecting a mere shell of a building only 15 feet from front to back, with a yard or open space at the rear of 25 feet deep between the building proposed to be erected and the opposite property, which would necessitate a very great sacrifice of property, to avoid which the last paragraph in the 39th by-law is provided.

It was contended on behalf of the respondent, that the by-law required that the space of 25 feet required to be left between the building to be erected and the opposite property, must be co-extensive with the line of demarcation between the said properties, and that

*607] *at no point should a less distance than twenty-five feet intervene between them, exclusive of any common passage.

The justices being of opinion that this was the correct interpretation of the by-law, convicted the appellant as aforesaid.

It was agreed between the parties that the by-laws and the plan


4 0
Passage
22 5
4 0
BILLIARD ROOM
14 ft. to Eaves
26 6
106 Sup. feet
No. 2.
Door
CASTLE HOTEL
1
44 ft. to Eaves
No.
CHESTER STREET
STREET

hereinbefore referred to should be taken to be annexed to and form part of this case.

The questions of law arising on the above statement, for the opinion of this Court, are,—first, whether, having regard to the admitted fact that the cellars under the said building numbered 1 were built before the confirmation of the by-law, there must be a clear space of 25 feet from the rear of the building numbered 1, erected since the confirmation of the said by-laws, to the property on the opposite side of the said common passage,—secondly, whether, under the circumstances aforesaid, it is not a compliance with the said by-law, if 25 feet be left from some portion of that building, so that there be left a clear open space in the rear or at the side thereof of 100 feet, without reference to the distance between the nearest point between the entire length of the building so erected as aforesaid and the property upon the opposite side of the said common passage.

The judgment of the Court was requested thereon, or what should be done in the premises.

Manisty, Q. C., for the appellant.—The appellant has, it is submitted, complied with the letter as well as with the spirit of the by-law in question. He has left a space of 106 square feet between his dwelling-house and the opposite property, which is at one part distant more than 25 feet from it. If the twenty-five feet are to be measured from every part of the rear or *side of the house, as is contended on behalf of the commissioners, the by-law would in [*608 very many cases entirely deprive the owner of the land of the power of building upon it at all. This never could have been intended: and these by-laws must be construed strictly.

Welsby, contrà.—The question is whether this by-law is satisfied by leaving a narrow strip of four feet twenty-five feet long between the appellant's dwelling-house and the opposite property. It is conceded that the by-law is well made under the 34th section of the 21 & 22 Vict. c. 98. The plain and obvious meaning of it is, that there shall be a clear space at the rear or side of a building like this of twenty-five feet at every part of it from the opposite property. The provision is a most important one, in order to secure proper ventilation in towns which are densely populated.

Manisty was heard in reply.

ERLE, C. J.—Putting the best construction which my judgment and experience enable me to put upon this by-law, I come to the conclusion that the decision of the magistrates upon the by-law made by the Birkenhead Improvement Commissioners, was right. The by-law provides that "every building to be erected and used as a dwelling-house shall during such use have in the rear or at the side thereof an open space exclusively belonging thereto to the extent of at least 150 square feet free from any erection thereon above the level of the ground other than a privy; but, where there is a water-closet, and no other privy, an open space of not less than 100 feet may be allowed." That is one general provision for all manner of buildings erected for dwelling-houses. The *commissioners have no discretionary [*609 power to alter or modify that. Now comes the part upon which our opinion is requested,—"And the distance across such open space between every such building and the opposite property at the

rear or side, exclusive of any common passage, shall be 10 feet at least; if such building be two stories in height above the level of such open space, the distance across shall be 15 feet; if such building be three stories, it shall be 20 feet; if more than three stories, 25 feet." The construction which the commissioners have put upon that, is, that the distance is to be measured from every part of the building to be erected and the opposite property, and that the whole line of the rear or side shall be free from any erection for at least 25 feet, where the height of the building exceeds three stories. I think that is the clear meaning of the by-law. The whole of the rear or side is to be kept free for at least 25 feet. A narrow strip four feet wide, leaving 25 feet between that part of the building and the opposite property, might, for the purpose of ventilation in a densely populated neighbourhood, be perfectly inadequate and illusory. The provision for leaving a clear space of 100 square feet applies to all manner of properties. I cannot see any ground for coming to any other conclusion than the justices have come to. And I do this the more readily because the by-law in question is qualified by the provision at the end of it,—"When, however, thorough ventilation is secured, or when, on the rebuilding of houses, these dimensions cannot be adhered to without considerable sacrifice of property, they may be modified in special cases, at the discretion of the commissioners." Thus, there is an universal rule given, subject to an application to the discretion of the commissioners. And it may be well worthy of the attention of the
*610] commissioners to see if *the rule can be modified in this case. I cannot but believe, that, if ventilation can be properly secured by leaving the space proposed by the appellant, the commissioners would not wantonly sacrifice his interests. The decision of the magistrates must be affirmed.

The rest of the Court concurred.

Welsby, for the respondents, asked for the costs of the appeal.

PER CURIAM.—We think that there should be no costs: it was a fair question for argument, and quite new.

Decision affirmed, without costs.

THE RUSSIAN STEAM-NAVIGATION TRADING COMPANY *v.* SILVA. *Jan.* 15.

By a bill of lading of wool from Odessa, freight was to be paid in London, on delivery, at the rate of 80*s.* per cwt., gross weight, tallow, and other goods, grain, or seed, in proportion, as per London Baltic printed rates:"—Held, that extrinsic evidence was admissible to show, that, by the usage of the trade, the meaning of the bill of lading was, that 80*s.* per cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured.

THE declaration stated, that, before the making the promise hereinafter mentioned, the plaintiffs were the owners of a certain ship, and had carried and conveyed in the same certain merchandise to the port of London, to wit, certain bales of wool, for certain freight, to be paid to the plaintiffs for the carriage of the same upon delivery thereof to the consignees or persons entitled to receive the same under the bills of lading; that the defendant was the owner of a certain wharf or
*611] warehouse in the said port; that thereupon, *in consideration that the plaintiffs would deliver and place the said merchan-

dise into the defendant's possession, to be warehoused and taken care of by the defendant for certain rent and charges to be paid to the defendant in that behalf, the defendant promised the plaintiffs that he the defendant would keep and detain the said merchandise in his possession until the said freight should be paid, or until he received notice from the plaintiffs to release the said goods: Averment, that the plaintiffs performed all conditions precedent, and all times elapsed, and all matters and things were done and happened to entitle the plaintiffs, and they became and were entitled, to have had the said promise performed and fulfilled, and to have had the said merchandise detained and kept in the possession of the defendant until the said freight was paid, or until they the plaintiffs gave an order to the defendant for the release of the said merchandise as aforesaid: Yet the defendant broke his said promise in this respect, that, although the said freight had not been paid, nor had the plaintiffs given such notice to the defendant as aforesaid, the defendant did not detain or keep in his possession the said merchandise, but gave the same up to the said consignees, and the same was thereupon removed and taken away from the said wharf and premises of the defendant before payment of the said freight, and without any order from the plaintiffs to release the same, whereby the plaintiffs suffered great loss and damage, by losing their lien on the said merchandise, and being unable to obtain payment of the freight so due to the plaintiffs as aforesaid, and which still remained unpaid; and the plaintiffs had been put to great trouble, expense, and costs in endeavouring to obtain payment of the said freight from the said consignees. There was also a count for money payable for freight.

*The defendant pleaded,—first, to the first count, that, before he gave up the said merchandise to the consignees, and before any part thereof was taken or removed away from the said wharf and premises of the defendant, the said freight was paid,—secondly, to the second count, never indebted, and a special plea, which became immaterial. Issue thereon. [*612

The cause was tried before Erle, C. J., and a special jury, at the London sittings after last Michaelmas Term. The plaintiffs are a company trading between Odessa and England, and the proprietors of a steam-vessel called the Odessa. The defendant is the proprietor of the Gun and Shot and Griffin's wharves, in Morgan's Lane, Tooley Street. In November, 1860, 170 bales of wool were shipped at Odessa, on board the plaintiffs' vessel Odessa, consigned to one Henry Ludolf, a wool-merchant at Leeds, under two bills of lading, in the following form:—

"Shipped in good order and condition, by M. Othon Trithen, in and upon the steam ship called the Odessa, whereof is master for the present voyage S. Lazzarovich, or whoever else may go as master in the said ship, and now in Odessa, and bound for London and &c., with liberty to call, receive cargo and passengers at Malta, Gibraltar, and any other ports, &c., and with liberty to sail with or without pilots, and to tow and assist vessels in all situations, eighty-five bales of dunshay washed wool, gross weight 763 puds, being marked and numbered as in the margin, and to be delivered in the like good order and well-conditioned at the aforesaid port of London, the act of God, the Queen's enemies, pirates, thieves, and robbers, restraint of princes, rulers, and people, vermin, jettison, barratry, and collision, fire on board, in hulk or craft, or on shore, and all accidents,

The agents in London are Smith, Sundins & Co., 17, Gracechurch Street.

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loss, and damage whatsoever from machinery, boilers, and steam and steam-navigation, or from perils of the seas and rivers, or from any act, neglect, or default whatsoever of the pilot, masters, or mariners, being excepted, and the owners being in no way liable for any consequences of the causes above excepted, unto order, or to his or their assigns: freight for the said goods payable in London, on delivery, *at the rate of* 80*s. sterling per ton of* 20 *cwt., gross weight, tallow, other goods, grain, or seed, in proportion, as per London Baltic printed rates*, immediately in cash, without discount, with average accustomed.

"In witness whereof the master or agent of said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which bills being accomplished, the other to stand void.

"Dated in Odessa, Nov. 6th, 1860.

"Weight, contents, and value unknown, and not answerable for leakage, breakage, rust, damage caused by heavy weather or pitching or rolling of the vessel, inherent deterioration, or defective packages, or wrong delivery caused by error or deficiency in the marks or numbers. The goods to be taken from the ship by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed or put into craft by the master or ship's agent, at the merchant's risk and expense. The ship's responsibility to cease immediately the goods are discharged from the ship's deck.

(Signed) "S. LAZZAROVICH."

The Odessa, with the wool on board, arrived in London on the 3d of January, 1861. On the same day, the defendant received the following notice, signed by Lazzarovich,—

"To the superintendent of Gun-Shot Wharf.

"I hereby give you notice to detain such of the undermentioned goods which are or shall be landed from the ship Odessa, from Odessa, under my command, for production of the bills of lading properly endorsed, and until the freight to which the same are *subject or liable shall be paid or satisfied, except when the bills of lading state that the freight was paid abroad, in proof of which you will be pleased to receive the directions of Smith, Sundius & Co., only.

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"Goods to be detained,—All goods landed at your wharf."

The defendant thereupon sent to Messrs. Smith, Sundius & Co., an undertaking of which the following is a copy:—

"Gun-Shot and Griffin's Wharves.

"To Messrs. Smith, Sundius & Co.

"Gentlemen,—Having received orders to land and warehouse the undermentioned goods ex Odessa, Captain Lazzarovich, from Odessa, I agree to hold the said goods for freight, &c., as empowered per Public Sufferance Wharf Act, 11 & 12 Vict. Session 1847–8, until I have notice from you to release the same; and I shall be obliged by your giving orders to the officer in charge to deliver the said goods to Messrs. Harkness & Sturdy's lighters. "T. P. SILVA.

"170 bales wool (quantity in entry).

"N.B. Please send me the release as soon as the freight is settled."

The number of bales actually received by the defendant was only 155; the remaining 15 bales having, through some misunderstanding with the officer in charge of the Odessa, been landed in the London Docks. The defendant having received from Ludolf a sum equal to what he conceived to be the freight of the wool, at 80*s.* per cwt., forwarded the 155 bales to Ludolf's order. The plaintiffs, however, demanded a much larger sum; their interpretation of the bill of lading being, that "80*s.* per cwt. tallow," meant that tallow was to be

the standard by which the rate of freight on all other goods was to be *measured, and not, as the defendant supposed, the amount of freight to be paid for the wool. [*615

Several Greek merchants were called on the part of the plaintiffs, who proved that this was the true construction of the document according to the general understanding of the trade,—the scale of freights for the Baltic having been settled about thirty-five years ago.

On the part of the defendant it was objected, that, the bills of lading being unambiguous on their face, parol evidence was not admissible to explain their meaning; more especially as the defendant was wholly unconnected with the Russian trade.

The Lord Chief Justice, however, received the evidence, and directed the jury accordingly: and they returned a verdict for the plaintiffs for the sum claimed.

Parry, Serjt., now moved for a new trial on the ground of misreception of evidence and misdirection.—There is nothing ambiguous on the face of the bill of lading, nothing to lead any one reading it with ordinary intelligence to suppose that he was to pay anything but 80*s.* per cwt. for wool. [ERLE, C. J.—This is a perfectly well-known mode of charging in the Russian trade.] The defendant was not a Russia merchant, or in any way connected with the Baltic trade. If a sensible and grammatical construction can be given to the words of an instrument, extrinsic evidence of mercantile usage is not admissible to vary or explain it. None but persons who, being in, are conversant with the particular trade, are bound by local or peculiar usages or customs. It is only where they can reasonably be supposed to have contracted with reference to them that they are affected by them. The rule is well laid down in the notes to Wigglesworth *v.* Dalison, *1 Smith's Leading Cases, 5th edit., p. 530: "With respect to contracts commercial, it has been long established that evidence of a *usage of trade* applicable to the contract, and which the parties making it knew or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the written contract is silent. The words '*usage* of trade' are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants which is the universal established law of the land, which is to be collected from decisions, legal principles, and analogies, not from evidence in pais, and the knowledge of which resides in the breasts of the judges." The defendant had no interest in the matter: whatever freight he was compelled to pay, Ludolf must have repaid him. [WILLIAMS, J.—If this had been an action upon the bill of lading, you concede that evidence of the usage of the trade would have been admissible?] No doubt, if the action had been against the real consignee of the wool, no exception could have been taken to evidence of a custom of which the party would be bound to be cognisant. [*616

WILLIAMS, J.—I am of opinion that there was no misdirection in this case, and therefore no foundation for a rule. I incline to agree with my Brother *Parry*, that, if this had been an instrument so worded as that any Englishman would have read it without encountering any difficulty in its construction, the defendant would not have

been bound by any artificial or peculiar construction which those conversant with the trade would put upon it. It is not necessary, however, to express any opinion on that; because on the mere perusal of this bill of lading, I think any person of ordinary understanding
*617] would have found that it did not mean *what the words at a cursory glance would seem to convey. The words are, "freight for the said goods payable in London, on delivery, *at the rate of* 80*s.* per ton of 20 cwt., gross weight, tallow." Then it goes on, "other goods, grain, or seed, in proportion, as per London Baltic printed rates." A person of ordinary caution and circumspection, on reading that, would not have come at once to the conclusion that all goods were to be paid for at the rate of 80*s.* per cwt.; but would have required some explanation as to what amount of freight really was due. As the defendant has undertaken to act upon this bill of lading, he was bound to make himself master of its true meaning, and cannot plead ignorance as an excuse. I do not think he can fairly be said to have been misled by the plaintiffs, but rather by his own want of prudence and diligence in abstaining from making inquiry. Having parted with the goods without seeing that the proper amount of freight was duly paid, he has broken his undertaking, and must pay the penalty. I am clearly of opinion that the Lord Chief Justice was quite right in receiving extrinsic evidence of the meaning of the contract.

WILLES, J.—I am of the same opinion. It is unnecessary to say what would have been the case if there had been any misleading of the plaintiffs by the terms used in the bills of lading. But, I apprehend, that, whenever a man undertakes to perform a duty, he undertakes to perform it with a reasonable degree of care and skill; and that, where the performance has reference to a particular trade, necessarily involves an obligation on the party to make himself acquainted by due inquiry with the usages of that trade. Upon the true construction of these bills of lading, I am clearly of opinion that the
*618] 80*s.* per cwt. does appear to be *applicable to tallow as the standard only. It would be an absurd construction to take the 80*s.* as applicable to wool. If it is taken as applicable to tallow, the remaining words "other goods in proportion" will have a sensible construction, and include wool. That seems to me to be the construction which must be obvious to every man of business. I therefore think there is no objection to the course taken by my Lord, or to the way in which he left the case to the jury.

KEATING, J.—I am of the same opinion. The defendant undertook to hold the wools and not to part with them until the freight due upon them was paid, according to the contract in the bills of lading. If the documents on the face of them had contained a clear intimation that 80*s.* per cwt. was to be the freight payable for wool, no extrinsic evidence would have been admissible to give them any other construction, and the defendant would have been justified in letting the goods go on receipt of that amount of freight. But, to say the least, the bills of lading on the face of them are very vague. The defendant ought to have made inquiry, and to have informed himself as to the meaning of the words used. They are not words plainly and unequivocally importing that 80*s.* per cwt. was the freight for

which the defendant was to hold the goods. It is very unfortunate that the defendant should be made to suffer for his blunder, which was probably occasioned by the estrangement between him and the brokers for the ship, arising out of the non-delivery of the remaining 15 bales. The slightest inquiry addressed to them would have relieved him from all difficulty. It is his own fault that he omitted to take that course, and he must suffer for it.

ERLE, C. J., concurred.

Parry, Serjt., asked for leave to appeal.

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ERLE, C. J., after consulting with the other learned Judges, said: None of us entertain the smallest doubt, and therefore we do not feel warranted in allowing an appeal. The defendant is not without remedy. Mr. Ludolf is liable to him for what he has been compelled to pay on his account. Rule refused.

STOTT and Another *v.* CLEGG and Another. *Jan.* 26.

The 55th section of the General Turnpike Act, 3 G. 4, c. 126,—which provides, that, "if the person or persons who shall be the farmer or renter, or collector or collectors of such tolls, shall take a greater or less toll from any person or persons than what is authorized or directed by this or the particular turnpike Act, he or they shall for every such offence forfeit the sum of 5*l.*, and the said agreement for renting the tolls shall, if the said trustees or commissioners shall think fit to vacate the same, become and be null and void,"—does not prevent the farmer or lessee from making compositions with persons using the road, even though it be for a period longer than the trustees themselves are by the 4 G. 4, c. 95, s. 13, authorized to compound for tolls.

THE first count of the declaration stated, that, before and at the time of the making of the agreement hereinafter mentioned, the plaintiffs were possessed of certain collieries and a certain farm situated in the township or division of Ashworth, in the parish of Myddleton, in the county of Lancaster, and the plaintiffs and their customers were in the habit of using certain roads called the Bamford turnpike-roads, with carts laden and unladen coming from and going to the said collieries and farm, paying toll for such use at certain turnpike-gates belonging to the trustees of the said Bamford turnpike-roads, to wit, Half-Acre, Wheelbarrow Lane, Heywood Lane End, and Fairfield gates; and the defendants had become and were the lessees and farmers of the said tolls of the said Bamford turnpike-roads: that, thereupon, on the 5th of May, 1862, it was *agreed by and between the plaintiffs and the defendants, that, in consideration of 291*l.* 15*s.* to be paid by the plaintiffs to the defendants by twelve quarterly payments, the plaintiffs and their customers going to and from their said collieries and farm should from and after the making of the said agreement have the right of passing through Half-Acre, Wheelbarrow Lane, Heywood Lane End, and Fairfield gates, with carts and other conveyances, laden or unladen, until the 1st of April, 1865, free from all toll, and that the chain horses should have the right of helping up the carts at Simpson Clough, as then used: Averment, that the plaintiffs had in all respects performed their part of the said agreement so as to entitle them, and all things and conditions had happened and been performed which were necessary to happen and be to entitle them to have the same agreement of the defendants per-

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formed by them: Yet that the plaintiffs and their customers going to and from the said collieries and the said farm, by the default of the defendants in that behalf, had not had or been suffered or permitted by the defendants to enjoy, nor have they nor are they suffered or permitted by the defendants to enjoy, the said right of passing through Half-Acre, Wheelbarrow Lane, Heywood Lane End, and Fairfield gates aforesaid, with carts and other conveyances, laden or unladen, free from toll, according to the said agreement of the defendants; but, on the contrary thereof, after the making of the said agreement, and before the suit, divers of the carts and other conveyances of the plaintiffs and of their customers going to and from the said collieries and the said farm laden and unladen, had been and were by the default of the defendants prevented and hindered from passing through the several gates aforesaid free from toll, and had been and
*621] were compelled by the respective *collectors of the tolls at the several gates aforesaid to pay tolls for the said carts and other conveyances respectively; whereby the plaintiffs had been compelled to pay divers sums of money for and in respect of such tolls, and had been and were compelled to sell the coals from their said collieries at a less price than they otherwise would and might have done and might and would do, and were hindered and prevented from carrying on their trade and business at the said collieries and at the farm in so beneficial and profitable manner as they otherwise might and would have done, and might and would do, and had incurred great loss and inconvenience: And the plaintiffs also sued the defendants for money payable by the defendants to the plaintiffs for money received by the defendants to the use of the plaintiffs; and the plaintiffs claimed 500*l.*, and a writ of injunction to restrain the defendants from the repetition or continuance of the injuries above complained of, and other injuries of a like nature to the plaintiffs' rights.

Third plea, to the first count,—that the said tolls which the plaintiffs and their said customers had been and were compelled to pay as in the first count mentioned, were at the times of the making of the said agreement and of such payments respectively, such tolls as were authorized and directed to be taken, and the same were demanded and taken, by and by virtue of the particular turnpike Acts in force relating to the said Bamford turnpike-roads in the first count mentioned.

The defendants also demurred to the first count, the ground stated in the margin being, "that it was not lawful for the defendants as farmers of the said tolls to compound with the plaintiffs for tolls, as is attempted to be done by the agreement declared on." Joinder.

*622] Replication to the third plea,—that, at the *respective times of the making of the said agreement in the declaration mentioned, and of the committing of the said breaches thereof in the declaration alleged, the defendants were the lessees and farmers of and the parties beneficially interested in the taking and collection of the said tolls, and that the said agreement was entered into by them as such lessees and farmers as aforesaid after the passing and coming into operation of the said turnpike Acts in the said third plea mentioned; and that the said tolls in that plea mentioned were tolls which by the

said turnpike Acts were authorized and directed to be taken from persons other than persons who had made or entered into, or should make or enter into, any such agreement or agreements as that in the declaration mentioned; that it was by the order and direction of the defendants that the plaintiffs were compelled to and did pay the said tolls in the said third plea mentioned; and that, by reason of the said agreement, the said tolls were not tolls which the defendants after the making of the said agreement were authorized or entitled by the said turnpike Acts to take from the plaintiffs or from their customers.

The defendants joined issue on the replication to the third plea, and also demurred thereto, the grounds of demurrer stated in the margin being "that the defendants were authorized and entitled and bound to take the said tolls, notwithstanding the said agreement." Joinder.

Manisty Q. C. (with whom was *Holl*), for the plaintiffs.—The contention on the part of the defendants will be that a farmer of tolls cannot make a contract like this. The private Act, 13 & 14 Vict. c. lxxxvii., which imposes upon the trustees the duty of collecting the tolls, has nothing special in it: and there is *nothing in the [*623
General Turnpike Acts, 3 G. 4, c. 126, and 4 G. 4, c. 95, to make the contract illegal. The 42d section of the 3 G. 4, c. 126, enacted that it should and might be lawful for the trustees or commissioners of any turnpike-roads, from time to time as they should see convenient, to compound and agree, *for any term not exceeding three years at any one time*, with all or any of the inhabitants of the several parishes, hamlets, or places to or through which such road might lead or pass, for the passing of their horses, cattle, or carriages through all or any of the toll-gates to be erected on such road, or on the sides thereof; which composition should be paid yearly in advance, and, in default thereof, the composition or agreement with the person or persons making such default should thenceforth be void; and all such composition-money should be paid and applied in such manner as the tolls were directed to be paid and applied, &c. That section was repealed by the 11th section of the 4 G. 4, c. 95: and the 13th section of the last-mentioned Act enacts "that the trustees and commissioners of every turnpike-road may, and they are hereby empowered, from time to time as they shall see convenient, to compound and agree, *for any term not exceeding one year* at any one time, with any person or persons, for the tolls payable for any horses, cattle or beasts, or carriages passing through any of the turnpikes or toll-gates of the road under their care and management, and collected and taken under the authority of the particular Act or Acts in execution of which the trustees or commissioners making such composition shall act, or of the said recited Act [3 G, 4, c. 126] or this Act." The mode of letting is still regulated by the 55th section of the 3 G. 4, c. 126, which enacts "that it shall and may be lawful for the trustees or commissioners of every turnpike-road, at a public meeting to [*624
*let to farm the tolls of the several gates erected upon their respective turnpike-roads, in the matter hereinafter mentioned, although no express power shall have been given by any Act or Acts for that purpose; and that, whenever any tolls shall hereafter be let

to farm by virtue of the powers given by this or any other Act or Acts of Parliament, the following directions shall be observed, that is to say, the trustees or commissioners shall cause notice to be given of the time and place for letting the same, at least one month before the day to be appointed for that purpose, by affixing the same upon every toll-gate belonging to such turnpike-road, and also by insertion thereof in some public newspaper circulated in that part of the country, and specifying in every such notice the sum which the said tolls produced in the preceding year, clear of the salary for collecting the same, in case any hired collector was appointed, and that they will let such tolls by auction to the best bidder, on his producing sufficient sureties for payment of the money monthly or otherwise (as in such notice shall be specified), and that they will be put up at the sum which they were let for or produced in the preceding year, clear of the salary of the collector; and, to prevent fraud or any undue preference in the letting thereof, the trustees or commissioners are hereby required to provide a glass with so much sand in it as will run from one end of it to the other in one minute, which glass at the time of letting such tolls shall be set upon a table, and immediately after every bidding the glass shall be turned, and, as soon as the sand is run out, it shall be turned again, and so for three times, unless some other bidding intervenes, and, if no other person shall bid until the sand shall have run through the glass three times, the last bidder shall be the farmer or renter of the said tolls, and shall forthwith enter into *625] *a proper agreement for the taking thereof, and paying the money at the times specified in such notice, with such surety or sureties for payment thereof, and under such conditions and in such manner as the said trustees or commissioners shall think fit; and, if the person being the last bidder shall not forthwith enter into such agreement, it shall and may be lawful to put up the said tolls again immediately for another bidder, and in like manner to continue putting up the same until a bidder shall be found who shall enter into such agreement; and, in case no bidder shall offer, or in case the same shall not be let at such auction, it shall be lawful for the said trustees or commissioners to accept a private tender for the same, and to demise or let to farm, or agree to demise or let to farm, all or any of such tolls, at any sum not less than the sum at or for which they shall then have been last let; or the said trustees or commissioners may appoint a collector of such tolls, or fix some future day for the letting thereof, as they shall judge most proper, upon giving such notice thereof as aforesaid, and shall and may in that case put them up at such sum as they shall think fit; and, if the person or persons who shall be the farmer or renter, or collector or collectors of such tolls, shall take a greater or less toll from any person or persons than what is authorized or directed by this or the particular turnpike Act, he or they shall for every such offence forfeit the sum of 5*l.*, and the said agreement for renting the tolls shall, if the said trustees or commissioners shall think fit to vacate the same, become and be null and void." There may be good reason why the trustees or commissioners should be restrained, but there is no reason why the farmer or lessee should: the trustees get neither more nor less in consequence of the bargain which the lessee makes with those who use the road. [KEAT-

ING, J.—The *lessee might be interested in increasing the traffic, and so might render the repair of the road more burthensome.] [*626 The object of the statute was to make the tolls uniform. [WILLIAMS, J.—In Burn's Justice, Highways, § IX., p. 736, n., edit. 1845, it is said that "credit may be given for tolls, where there is no collusion:" no authority is cited for this, but it is probably founded upon the dictum of Bayley, J., in Peacock *v.* Harris, 10 East 104.] The 30th section of the 4 G. 4, c. 95, imposes a penalty on any collector who "shall demand and take a greater or less toll from any person than he shall be authorized to do by virtue of the powers of any Act, or of the orders and resolutions of the trustees or commissioners made in pursuance thereof." The whole spirit of the Act is to enable the trustees to get the most rent they can: and it would be highly inconvenient if agreements of this sort were held to be illegal.

Mellish, Q. C. (with whom was *R. G. Williams*), contrà.—This is clearly an illegal agreement. The 42d section of the 3 G. 4, c. 126, gave the trustees or commissioners power to make compositions for three years. The 4 G. 4, c. 95, s. 13, limits this power to one year. So that the trustees are limited to compositions for *one* year; whereas here the composition is for *three* years. That a collector appointed by the trustees would be liable to a penalty if he took less than the proper amount of toll, or no toll at all, cannot be doubted: 4 G. 4, c. 95, s. 30. And the 55th section of the 3 G. 4, c. 126, imposes the same penalty on the farmer or renter, in the same words,—"If the person or persons who shall be the farmer or renter, or collector or collectors of such tolls, shall take a greater or less toll from any person or persons than what is authorized or directed by this or the particular turnpike *Act, he or they shall for every such offence forfeit the sum of 5*l.*, and the said agreement for renting the tolls [*627 shall, if the said trustees or commissioners shall think fit to vacate the same, become and be null and void. The 56th section enacts, that, "in every case where the terms of such agreement shall not be fulfilled, but the rent or sum of money to be paid at the commencement of any one month shall not be paid when the same shall become due, but shall remain unpaid for three days after the same shall become due, then and in every such case the trustees or commissioners making any such agreement shall, and they are hereby empowered, if they shall think fit, to declare the said agreement void, and to re-enter and take possession of any such toll-gate, bar, or toll-house, and the tolls there collected, and to relet the same in manner hereinbefore directed, and to appoint a collector or other fit and proper person to collect and receive the same, and to put out and remove the person or persons so failing in their agreement." Would the trustees, re-entering under this provision, be bound by any composition which the farmer or renter might have made? Clearly not. Further provision is made in the 59th section of the 4 G. 4, c. 95, for vacating the agreement for demising or letting the tolls, and no reference is made to existing compositions. The 31st section of the 13 G. 3, c. 84, the Act in force at the time of the decision in Peacock *v.* Harris, 10 East 104, contained an enactment, that, "if the person or persons who should be the farmer or renter of the said tolls should take a greater or less toll from any person or persons than what were authorized or directed by

that or the particular turnpike Act, he or they should for every such offence forfeit the sum of 5*l.*, and should also forfeit the said contract for renting the tolls, if the said trustees should think fit to vacate the
*628] same," *and that "every other gatekeeper authorized to collect the tolls, who should take a greater or less toll than as aforesaid, should for every such offence forfeit the sum of 40*s.*" By the 9th section of that Act the trustees and their lessees were absolutely prohibited from making any composition for tolls for or in respect of any wagon, wain, cart, or carriage, or horses or beasts of draught drawing the same, unless such wagons, &c., had the fellies of the wheels of the breadth or gauge of six inches or more. [ERLE, C. J.—That was a premium on bringing broad fellies on the road.] It is obvious that these agreements may operate injuriously to the interests of the public, inasmuch as the only interest the farmer has, is, to induce as much traffic as possible to come upon the road, regardless of the amount of repair which the increased traffic will render necessary.

Manisty, Q. C., in reply.—The power of the trustees to vacate the demise if the farmer or renter takes more or less than the prescribed toll, does not affect the construction of the 55th section of the 3 G. 4, c. 126, in this respect. There is no such prohibition on the lessee's making compositions, as that contained in the 9th section of the 13 G. 3, c. 84. Nor is there any necessity for it, seeing that the trustees may, if they think proper, prevent such compositions by inserting a stipulation to that effect in their agreement.

ERLE, C. J.—I am of opinion that the plaintiffs are entitled to recover. They have entered into an agreement with the defendants which contains nothing upon the face of it to enable me to say that it is in any respect unlawful. The agreement is, that, in consideration of 291*l.* 15*s.* to be paid by the plaintiffs to the defendants by twelve
*629] quarterly payments, the plaintiffs *and their customers going to and from their collieries and farm should, from and after the making of the agreement, have the right of passing through the turnpike-gates in question with carts and other conveyances, laden or unladen, for three years, free from all tolls. The question is whether the 55th section of the General Turnpike Act, 3 G. 4, c. 126, impliedly contains any prohibition against the making of such an agreement. The words are,—"If the person or persons who shall be the farmer or renter, or collector or collectors of such tolls, shall take a greater or less toll from any person or persons than what is authorized or directed by this or the particular Turnpike Act, he or they shall for every such offence forfeit the sum of 5*l.*, and the said agreement for renting the tolls shall, if the said trustees or commissioners shall think fit to vacate the same, become and be null and void." No doubt, one who compounds for tolls does not pay exactly the same as if the toll according to the scale were demanded of him each time he passes through the turnpike-gate. But, is the agreement for a composition therefore prohibited? At first sight, there seemed to be much in the argument that the interest of the farmer or renter to increase the traffic might conflict with that of the public, by increasing the burthen of repair. But, upon reflection, I do not think we can take judicial notice of that, or allow it to form the foundation of our decision. The main object

of the legislature I take to have been, to insure that there shall be no variation in the sum authorized to be taken for toll at turnpike-gates. A board is to be put up on the front of the toll-house, containing a list of the tolls payable there; and no other tolls are to be demanded or taken. But I do not think that has any reference to compositions. This construction is much fortified by the course of the provisions in the several statutes relating to compositions. By [*630 the 13 G. 3, c. 84, s. 9, the trustees *and their lessees* are absolutely prohibited from making any compositions for tolls, except with respect to vehicles of a particular description. Then came the 3 G. 4, c. 126, s. 42, which enabled the trustees or commissioners to compound for any term not exceeding *three* years,—but saying nothing about the farmers or lessees. The 4 G. 4, c. 95, s. 13, continues the provisions for compositions by the trustees, but limiting them to *one* year,—but again saying nothing about farmers or lessees. The implication from these provisions seems to me to be rather in favour of Mr. *Manisty's* argument. The 19th section of the 3 G. 4, c. 126, enacts "that it shall not be lawful for the trustees or commissioners of any turnpike-road, *their lessee or lessees*, collector or collectors, or other officers, to make any composition for any additional tolls or duties for or in respect of the overweight, or in any other manner as to the weight which any wagon, wain, cart, or carriage shall carry or weigh, any law to the contrary thereof notwithstanding; but every contract and agreement for such composition for overweight shall be null and void to all intents and purposes whatsoever; and every *lessee*, collector, or other officer entering into or agreeing to any such composition, and every person or persons with whom any such composition or agreement shall be made or entered into, shall for every such composition or agreement, and for every abatement of toll for overweight in consequence thereof respectively, forfeit and pay the sum of 50*l.* to any person or persons suing for the same." When, therefore, the legislature intended the prohibition to extend to the farmer or lessee, they knew how to express themselves. If it had been contemplated that compositions by the lessee should be altogether prohibited, I think we should [*631 have found it expressed in more clear terms than I find in the Act, and would not have been left to inference and implication. I do not see that any inconvenience can arise from this construction, inasmuch as the 55th section enables the trustees to make such conditions in their agreements as they may think fit: and it is competent to them, if any danger can arise from the making of these compositions, to insert a stipulation for avoiding the agreement if any composition is entered into. For these reasons, I have come to the conclusion that there is nothing to render this agreement invalid.

WILLIAMS, J.—I am of the same opinion. As soon as the defendants had become the lessees or farmers of the tolls in question, they, by putting themselves under a liability to pay the stipulated rent to the trustees, acquired a right to take for their own use all the tolls payable at the several turnpike-gates included in their demise. The whole interest in the receipt of the tolls vested exclusively in them. That being so, it follows as a necessary consequence that they had power to dispense with the receipt of tolls altogether, or to make such terms as they might think right with persons passing through the

gates, unless there is something in the Acts of Parliament to control that right. The question, therefore, is simply one of construction,—whether there is anything in the Turnpike Acts to prevent their making special bargains or compositions. It is said that they are prohibited from so doing by the 55th section of the 3 G. 4, c. 126, which enacts, that, "if the person or persons who shall be the farmer or renter or collector or collectors of such tolls shall take a greater or less toll from any person or persons than what is authorized or directed
*632] by this or the particular Turnpike Act, he or they shall for *every such offence forfeit the sum of 5*l.*, and the said agreement for renting the tolls shall, if the said trustees or commissioners shall think fit to vacate the same, become and be null and void." It is said that that necessarily involves a prohibition against the lessee's abstaining from taking any toll. That seems to me to be a very harsh construction of the Act, and one which is not to be adopted without some good reason for it. The lessee's own cattle and carriages must pass toll-free. May he not extend that immunity from toll? The argument must go the length of saying that the lessee incurs a penalty of 10*l.* if at any time, and from whatever motive, he excuses any person from the payment of toll, although he is the only person interested in a pecuniary point of view in the tolls. I think it is impossible to put such a construction upon the Act. The words do not call for such a construction, and they are not to be strained by implication to anything so unreasonable. That being so, it remains only to be considered whether there is anything in the general policy of the Act to constrain us to adopt the view presented by Mr. *Mellish*. These compositions, he says, cause an increase of the traffic, at the expense of those upon whom is cast the burthen of keeping the roads in repair. A sufficient answer, as it seems to me, was given to that by Mr. *Manisty*. There is no reason to suppose that any consequence of that sort will be superinduced: and, if there be, the trustees or commissioners have it in their power to prevent it by stipulating with the lessees that they shall not enter into any compositions. I see nothing in the Act to prohibit the lessees from excusing any person from the payment of the ordinary tolls, upon such terms as they may see fit.
*633] Willes, J.—I am of the same opinion. It is pretty *clear that no practical inconvenience can result from our decision; for, the trustees have power to impose any conditions they please on those who enter into agreements with them, and may, if the agreement is violated, summarily put an end to it, pursuant to the provisions in s. 59 of the 3 G. 4, c. 126.

Keating, J.—I must confess I have not been altogether free from doubt; nor can I say that my doubt is altogether dispelled: but, at the same time, I concur with the rest of the Court. One of my difficulties has certainly been removed by Mr. *Manisty's* reply. I feel strongly that the interests of the lessees may conflict with the interests of the trustees in the way suggested by Mr. *Mellish:* but the trustees may easily get rid of any difficulty on that score, if it does present any practical difficulty, by making it a condition of their agreements that no compositions shall be entered into by the farmers or lessees. Upon the whole, however, I concur in the opinions expressed by my Lord and my two learned Brothers; and I do this the more readily

because in urging the objection the defendants are seeking to take advantage of the supposed invalidity of an agreement which they have voluntarily entered into. Judgment for the plaintiffs.

*CHENEY *v.* COURTOIS. *Jan.* 22. [*634

An affidavit filed with a bill of sale under the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1, was intituled "In the Queen's Bench," and the person before whom it was sworn described himself as "a commissioner for taking affidavits in the Exchequer of Pleas at Westminster:"—Held sufficient; for that the Court would presume, until the contrary was shown, omnia rite esse acta, and, if the commissioner had in fact authority to take the affidavit, perjury might be assigned on it.

THIS was an interpleader issue directed upon a summons taken out by the sheriff of Kingston-upon-Hull, in a cause of Courtois *v.* Howe. The plaintiff claimed the goods in question as assignee under a bill of sale given by Howe.

At the trial of the issue, before Wilde, B., at the last Summer Assizes at York, a certified copy of the bill of sale and affidavit, as required by the 17 & 18 Vict. c. 36, s. 1, having been put in, it was objected on the part of the defendant, the execution-creditor, that the affidavit was insufficient, the affidavit being intituled "In the Queen's Bench," and the jurat stating it to have been sworn before "A. B., a Commissioner for taking affidavits in the Exchequer of Pleas at Westminster."

The learned Baron directed a verdict to be entered for the plaintiff, subject to leave reserved to the defendant to move to enter a verdict for him if the Court should be of opinion that the affidavit of the execution of the bill of sale was insufficient, upon the ground above stated.

Kemplay, in Michaelmas Term last, obtained a rule nisi accordingly. He urged that the filing of the affidavit being a proceeding in the Court of Queen's Bench (3 G. 4, c. 39, s. 1, 17 & 18 Vict. c. 36, s. 1), the affidavit could only be sworn before a person duly qualified to take affidavits in that Court; and he referred to Sowerby *v.* Woodruff, 1 B. & Ald. 567, to show that the affidavit should be intituled in the Queen's Bench, and to Shaw *v.* Perkin, 1 Dowl. N. S. 306, where it was held that an affidavit intituled in the Court of *Queen's [*635
Bench, which appeared by the jurat to have been sworn before a Commissioner of the Court of Exchequer, could not be used in a matter pending in the Court of Queen's Bench.

Price, Q. C., and *Lewers* now showed cause.—It is not necessary that the affidavit should be sworn in any particular Court, merely because the office of the Court of Queen's Bench is the place of deposit of these documents. The 1st section of the 17 & 18 Vict. c. 36 requires the bill of sale, together with an affidavit of the time of such bill of sale being made and certain other requisites, to be filed in the Court of Queen's Bench, "in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed."(*a*) A warrant of attorney is an authority to confess judgment

(*a*) See 12 & 13 Vict. c. 106, s. 136.

in a particular Court; and, though it is to be filed in the Court of Queen's Bench, it must be intituled in the Court in which the judgment is signed. This is not a matter pending in the Court of Queen's Bench. In The Kennet and Avon Canal Company v. Jones, 7 T. R. 451, it was held that it was no objection to an affidavit to hold to bail, that it was not intituled "in the King's Bench," or that it appeared to have been sworn before "A. B., a Commissioner, &c.," without adding "of the Court of Queen's Bench," if in fact he were a Commissioner of that Court. The Court there said that they were satisfied that the objections to the affidavit were unfounded, "as the affidavit was positive with regard to the debt, and as an indictment for perjury might be framed on it if the contents were not true." So, in Perse v. Browning, 1 M. & W. 362,† where an affidavit of debt was sworn in Ireland, before a Commissioner of the Common Pleas and Exchequer,
*636] it was held by Parke, B., that the title of the Court *need not be prefixed to the affidavit when sworn; but that the affidavit might be taken before such Commissioner, to be afterwards intituled and used in either Court. The like was held in White v. Irving, 5 Dowl. P. C. 289, and Daley v. Mahon, 6 Dowl. P. C. 192. Again, in Burdekin v. Potter, 9 M. & W. 13,† it was held that an affidavit, intituled in the proper Court, and purporting to be sworn before "A. B., a Commissioner, &c.," was sufficient, and that the jurat need not state that he is a Commissioner for taking affidavits in that Court. Parke, B., in his judgment, relies upon The Kennet and Avon Canal Company v. Jones.(a) It is the duty of the officer to see that omne rite acta, and the Court will presume that the affidavit was sworn before a person duly qualified,—as this gentleman in fact is.(b) The affidavit is complete without the jurat: Bac. Abr., *Affidavit*.(c) At all events, this is such an error as may be cured by an amendment, Hollingsworth v. White, 6 Law Times, N. S. 604, or by a supplemental affidavit. In French v. Bellew, 1 M. & Selw. 302, Le Blanc, J., says: "It is not necessary in all instances that the affidavit of debt should be in that form which is capable of supporting an indictment for perjury; for, then an affidavit of debt sworn before a magistrate in a foreign country would be insufficient; whereas the court is in the habit of acting upon such affidavits, and, on the other hand, refuses
*637] to admit them when sworn before a justice of the peace or *mayor of a borough. This shows that the criterion of receiving such affidavits is not that the party making them may be indicted for perjury if false, but that they are only to guide our discretion here in ordering bail."

Kemplay, in support of his rule.—The true criterion has always been supposed to be whether or not the affidavit is such that the party making it could be indicted for perjury if it were false. Could the deponent be indicted upon this affidavit? It is submitted that he could not.(d) Where the affidavit is intituled in a particular Court,

(a) In Munden v. The Duke of Brunswick, 4 C. B. 321 (E. C. L. R. vol. 56), this Court held an affidavit to be sufficient, where the jurat was signed "A. B., a comm', &c."

(b) There was an affidavit to that effect.

(c) This assertion is hardly borne out by the authority cited,—"An affidavit is an oath in writing, signed by the party deposing, sworn before *and attested by him who has authority to administer the same.*"

(d) See The Queen v. Stone, Dears. C. C. 251.

"A. B., a commissioner, &c.," is sufficient: but it is otherwise where the affidavit is not so intituled,—The King *v.* Hare, 13 East 189,—so held, upon the authority of The Kennet and Avon Canal Company *v.* Jones, 7 T. R. 451. [ERLE, C. J.—There the party was applying for a mandamus, where he is always held to very strict practice.] In Frost *v.* Hayward, 10 M. & W. 673,† an affidavit intituled in the Exchequer purported to be sworn before "J. L., a master extraordinary in the High Court of Chancery," and the Court declined to allow it to be used. It was there urged in argument, that, on reference to the list of Commissioners for taking affidavits in this Court, it would be found that the person before whom that affidavit was sworn was in fact one of those Commissioners, as well as a master extraordinary in Chancery; and it was submitted that the Court would take judicial notice of its own officers. But Lord Abinger said: "I certainly should be much disposed to disallow this objection if I could; but I think we cannot take judicial notice of the names of our officers." Why should the Court here presume that the person before whom this affidavit was sworn is a Commissioner of the *Queen's Bench, when he himself certifies that he is a Commissioner of the Exchequer only? In Shaw *v.* Perkin, 1 Dowl. N. S. 306, Patteson, J., says: "A Commissioner of the Court of Exchequer has no right to take affidavits with respect to matters pending in this Court. A Judge of the Court of Exchequer could not decide on any matter pending in this Court, unless authorized by Act of Parliament so to do. Here, it appears in the jurat that he is a Commissioner of the Court of Exchequer: the affidavit is intituled in the Queen's Bench. I do not feel any doubt on the subject. I shall make no presumption at all." The affidavit required by the 17 & 18 Vict. c. 36, must be complete at the time of the filing: a defect in it cannot be supplied by an affidavit filed after the lapse of the twenty-one days. It would be a very loose mode of administering justice, to hold that a defect of jurisdiction can be cured by a presumption that all has been rightly done. [*638

ERLE, C. J.—I am of opinion that this rule must be discharged. Upon the trial of this issue, an affidavit of the time of the execution of a bill of sale duly filed with the proper officer of the Court of Queen's Bench was objected to as insufficient. The 1st section of the 17 & 18 Vict. c. 36 enacts that every bill of sale of personal chattels, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, &c., be filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving such bill of sale (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed), otherwise such bill of sale shall be null and void to all *intents and purposes whatsoever. It appears that the bill of sale in question was duly filed within twenty-one days of its execution, together with an affidavit, intituled in the Queen's Bench, and complying with all the requirements of the statute, save that, at the end of the jurat, the person before whom the affidavit is sworn states that he is "a Commissioner for taking affidavits in the Exchequer of Pleas at Westminster." According to Mr. *Kemplay's* argument, the rights of the parties under the bill of sale are to [*639

be lost, because we are to presume that the person who administered the oath is only a Commissioner for taking affidavits in the Court of Exchequer, and not in the Queen's Bench. I am of opinion that the statute intended to require the formality and sanction of an oath: and, unless it were shown to my satisfaction that the person before whom the affidavit was sworn had no power to administer an oath, I should feel bound to presume omnia rite esse acta. It was the duty of the officer of the Court of Queen's Bench not to file the bill of sale unless it was accompanied by an affidavit properly sworn and attested. We must presume that he has done his duty. It is obvious that the Commissioner before whom this affidavit was sworn may be, and most probably he is, a Commissioner for taking affidavits in all the Courts: nineteen out of twenty of them are so. If this deponent were indicted for perjury, it would be idle for him to contend, that, because the person who took the affidavit described himself as a Commissioner of the Court of Exchequer, he could not be shown to be a Commissioner of the Court of Queen's Bench also. In the event of an indictment, the Commissioner would be called; and, if he proved that he had authority to administer the oath, the description which he gave of himself at the time would be perfectly immaterial. The nearest case to the present is that cited *from the 6 Law Times, N. S. 604.
*640] There, a bill of sale appeared to have been executed on the 31st of December, 1860, and the date in the jurat of the affidavit which was filed with it was "the 10th of January, 1860." The essence of the transaction is the filing of the instrument within the twenty-one days: and the Court of Queen's Bench assumed that the date in the jurat arose from a mistake often made at the commencement of the year, and allowed the jurat to be amended. That was done in accordance with the maxim which ordinarily governs the interpretation of written instruments. "Benignæ faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat." The cases relied upon by Mr. *Kemplay* are very different in principle from the present. They were most of them cases where the rules of practice are very strict in requiring compliance with certain formalities, such as applications for a mandamus or a quo warranto. But none of them go the length of showing that such an objection as this ought to be allowed to defeat a document under which a party claims title. The real test, in my judgment, is, whether the affidavit is one upon which the deponent might be convicted for perjury, if he swore to that which was not true: and clear I am, that, if, in this case, an indictment were preferred against the party making this affidavit, if it were shown that the Commissioner was duly qualified to administer the oath, a conviction must follow. For these reasons, I am of opinion that this rule must be discharged.

The rest of the Court concurring, Rule discharged.

*Ex parte HOLDEN. *Jan.* 31. [*641

The 52d section of the Divorce Act, 20 & 21 Vict. c. 85, enacts that all decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under the authority of that Act, shall be *enforced and put in execution* in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution.

***Quære*, whether that provision authorises the registration under the 1 & 2 Vict. c. 110, of a decree for permanent alimony?**

The decree having been entered on the register, the Court declined, on motion, to order it to be expunged.

THE 32d section of the Divorce Act, 20 & 21 Vict. c. 85, enacts that "the Court may, if it shall think fit, on any such decree [for dissolving marriage, under s. 31], order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said Court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed: and, upon any petition for dissolution of marriage, the Court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife, as it would have in a suit for judicial separation,"—under s. 16.

The 52d section enacts that "all decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under authority of this Act, shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution."

A decree for dissolution of marriage having been pronounced against the husband in a suit in the Divorce Court, on the 28th of April, 1860, on the ground of adultery coupled with desertion without reasonable excuse for two years and upwards, and *ordering [*642 the respondent to pay all costs, and also to pay to the petitioner permanent alimony at the rate of 100*l.* a year, by monthly instalments, the following entry was made in the judgment-book kept by the senior Master of this Court under the authority of the 1 & 2 Vict. c. 110,—"Holden, Howard Aston. Decree made in her Majesty's Court for Divorce and Matrimonial Causes, dated the 28th of April, 1860: Mary Eleanor Holden *v.* Howard Aston Holden: an annuity, payable by monthly instalments, of 100*l.* a year."

Shee, Serjt., in Michaelmas Term last, on behalf of the respondent, obtained a rule nisi to expunge the above entry. He submitted that the registration of such a decree was not authorized by the 13th, 18th, and 19th sections of the 1 & 2 Vict. c. 110.(*a*) This question

(*a*) By the 13th section a judgment is to operate as a charge on real estate.

The 18th section enacts that "all decrees and orders of Courts of equity, and all rules of Courts of common law, and all orders of the Lord Chancellor or of the Court of review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any

arose before Vice-Chancellor Stuart on the 25th section of the Probate Act, 20 & 21 Vict. c. 77, which enacts that "the Court of Probate
*643] shall have *the like powers, jurisdiction, and authority for enforcing all orders, decrees, and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes, in relation to any suit or matter depending in such Court;" and his Honour held that an order of the Court of Probate directing the payment of a sum of money, does not, by being registered under the 1 & 2 Vict. c. 110, constitute a valid charge on land: Pratt *v.* Bull, 32 Law J. Ch. 21. "If," said his Honour, "an order of the Court of Probate is to have the force and effect of a registered judgment of a Court of law, or of a registered decree or order of the Court of Chancery, it must have that force and effect either by express words in the Act of Parliament which constituted the Court of Probate, or by necessary implication from the language of the two Acts of Parliament construed with reference to each other. It is quite clear, that, inasmuch as the Court of Probate was not in existence at the time when the 1 & 2 Vict. c. 110 was passed, there cannot be found in that Act words to support the case made by the bill. The words of that Act are confined to judgments of the superior Courts of common law at Westminster, and orders and decrees of the High Court of Chancery. The Act of 20 & 21 Vict. c. 76, which constituted the Court of Probate, might have declared, and probably would have expressly done so if the legislature had intended, that all orders,
*644] judgments, and decrees of that Court *should have the same force and effect as judgments of the superior Courts of common law at Westminster, and orders and decrees of the High Court of Chancery. There are, however, no such express words to be found in the 20 & 21 Vict. c. 77; but, in the 25th section there are very remarkable words, which say that the Court of Probate 'shall have the like powers, jurisdiction, and authority for enforcing all orders, decrees, and judgments made or given by the Court under that Act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the Court under that Act, as are by law vested in the High Court of Chancery for such purposes, in relation to any suit or matter depending in such Court.' That statute in plain language gives to the Court of Probate only authority to enforce its own orders in the same manner as the orders of this Court can be enforced by writs of execution, or in such other lawful manner as will not be inconsistent with the practice of this Court.

sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of common law, and the persons to whom any such moneys, or costs, charges, or expenses shall be payable, shall be deemed judgment-creditors within the meaning of this act; and all powers hereby given to the Judges of the superior Courts of common law with respect to matters depending in the same Courts shall and may be exercised by Courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment-creditors are in like manner given to persons to whom any moneys, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid."

And by s. 19 it is provided that no judgment, decree, &c., shall affect real estate, otherwise than as before the Act, until registered.

But the power of enforcing an order is one thing, and the force and effect of an order are another." In affirming the order in that case, Lord Westbury, C., says,—Pratt *v.* Bull, 32 Law J., Ch. 144,—"The charge and right of suit in equity given by that statute to the persons who obtain decrees of the High Court of Chancery, cannot in any sense be treated as part of the powers, jurisdiction, and authority of the Court of Chancery for enforcing its decrees; and these words in the 25th section of the Court of Probate Act denote only the ordinary powers of enforcing decrees by writs of execution and process in contempt." The language of the 25th section of that Act is substantially the same as that of the 52d section of the Divorce Act.

Mellish, Q. C., and *Hannan* showed cause.—It *certainly is difficult to say why there should be a difference in the mode of [*645 enforcing decrees of the Courts of Probate and of Divorce: but the language of the two statutes undoubtedly is somewhat different. In the 25th section of the Probate Act, the words are,—"the Court shall have the like powers, jurisdiction, and authority for enforcing all orders, decrees, &c., made under this Act, as are by law vested in the High Court of Chancery:" whereas, in the Divorce Act, s. 52, the words are,—all decrees and orders to be made by the Court under the authority of this Act shall be *enforced and put in execution* in the same manner as the judgments, orders, &c., of the High Court of Chancery." Now, one of the modes of enforcing and putting in execution the judgments, orders, and decrees of the High Court of Chancery, is, by registering them under the 1 & 2 Vict. c. 110. The case of Pratt *v.* Bull, therefore, is not decisive of the question. Giving the words of this Act their fair and natural interpretation, they are reasonably sufficient to bring the case within the 18th section of the 1 & 2 Vict. c. 110, which was intended to comprise every superior Court existing at the time. [WILLES, J.—This Court in one case held that they would not, where there was fair ground for doubt, remove the entry from the register, but would leave the parties to contest it in Chancery.(*a*) WILLIAMS, J.—Alimony, like pin-money, is the wife's personalty: it is for her personal sustenance, as pin-money is for her personal adornment. It has been held that arrears of the latter are not recoverable by the wife's personal representatives. The Duchess of Norfolk's case,—Howard, app., Digby, resp., 2 Clark & *Fin. 634. And see 1 Williams on Exe- [*646 cutors 678, 754. But it has never been decided whether arrears of alimony can be enforced in any way after the wife's death. I know it has been held that her representatives cannot maintain a bill for them.]

Shee, Serjt., and *G. Browne*, in support of the rule.—The provisions in the 1 & 2 Vict. c. 110 as to the registering of judgments apply to judgments for sums of money which may be satisfied by the person owing them. The decree for alimony cannot be satisfied: if such a decree may be registered, it must remain as a permanent charge upon the land as long as the wife lives. The Probate and Divorce Courts were not within the contemplation of the legislature when the 1 & 2

(*a*) Nicholls *v.* Rosewarne, 6 C. B. N. S. 480 (E. C. L. R. vol. 95). And see Graham *v* Connell, 19 Law J., Exch. 361; Mackintyre *v.* Connell, 1 Simmons, N. S. 225; Fleuster *v.* M'Clellan, 8 C. B. N. S. 357 (E. C. L. R. vol. 98).

Vict. c. 110 was passed: and nothing is said therein as to the decrees and orders of the Courts for which these are substituted. That alone, it is submitted, is an almost unanswerable argument against the application of those provisions to a decree like this. And it is not necessary that they should apply; for, the 32d section of the 20 & 21 Vict. c. 85 gives the Court ample means of otherwise enforcing its orders. The real meaning of the 52d section is, that the Divorce Court shall have all the powers of the Court of Chancery to enforce its decrees by attachment and execution. If it had been intended that its decrees should be registered, the legislature would have said so in terms. There is no substantial difference between the language of the Probate and the Divorce Act in this respect: and the judgment of Vice-Chancellor Stuart in Pratt *v.* Bull is quite as applicable to the one as to the other. At the time of the passing of the 1 & 2 Vict. c. 110, alimony awarded by the Ecclesiastical Court was enforced by process
*647] of contempt: and by the 6th section of the 20 & 21 *Vict. c. 85, all the powers and jurisdictions of that Court are to be exercised by the newly constituted Court. The intention of the legislature evidently was to place the powers of the new Court in all material respects upon the same footing as those of the old Court. By s. 32, the Court may compel the husband to secure to the wife a gross sum of money or an annual sum, by a deed or instrument to be executed by all necessary parties. We may assume that the Judge of the Divorce Court, having the parties before him, and having the best means of judging what would be proper to be done in the matter, has refused to order the security. [ERLE, C. J.—Or, it may be that the wife, relying upon *this* remedy for enforcing the order, abstained from asking for security.]

ERLE, C. J.—I am of opinion that this rule should be discharged. In a suit for dissolution of marriage in the Divorce Court, the wife has obtained a decree under the 32d section of the 20 & 21 Vict. c. 85 for an allowance of 100*l.* a year by the husband in the nature of alimony, and, relying upon the 52d section of that statute, which enacts that "all decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under the authority of this Act shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution," has caused that decree to be registered with the senior Master of this Court under the 1 & 2 Vict. c. 110. Taking the words of the 32d section in their plain and ordinary sense, a decree of the High Court of Chancery may be enforced and put in execution in the same manner as the judg-
*648] ments of the superior Courts of common law, or the *creditor may have the security of a charge on the land by registration under the 1 & 2 Vict. c. 110. That is the ground upon which I act on the present occasion. I am fully aware of the similarity of the words in the Probate Act, 20 & 21 Vict. c. 77, s. 25, to those of the Divorce Act, 20 & 21 Vict. c. 85, s. 52, and that the Court of Chancery has decided that a decree or order of the Probate Court cannot be enforced by means of registration under the 1 & 2 Vict. c. 110. The question in the Court of equity arises under the 18th section of that Act, which enacts that all decrees and orders of Courts of equity

whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior Courts of common law, and the persons to whom any such moneys, or costs, charges, or expenses shall be payable, shall be deemed judgment-creditors within the meaning of that Act; and all remedies thereby (s. 13) given to judgment-creditors are in like manner given to persons to whom any moneys, or costs, charges, or expenses are by such orders or rules respectively directed to be paid: and the Court of Chancery will decide in the particular case whether or not the remedy is to be applied. Under the Probate Act, they have decided that an order of that Court cannot be enforced in this way: and, if the wife were to proceed to enforce this decree in a Court of equity, possibly they may decide in the same way upon the Divorce Act. But that does not fall within my province. I discharge this rule, because, if I held that the decree cannot be registered, I should be finally deciding the question; whereas, if I decline to interfere, I leave it to the Court of Chancery to decide, subject to an appeal, whether the remedy is available or not. I am fully sensible of the difficulty imposed upon the husband by the registration of this decree: *but I think the least of the two evils will be to refuse to remove this entry. [*649

WILLIAMS, J.—I am of the same opinion. This Court is not to be considered as deciding absolutely that the decree in question is one that may be enforced in the same way as a decree or order of the Court of Chancery, but as declining to interfere, because the point may be more conveniently determined by a tribunal from whose decision there may be an appeal.

WILLES, J.—I am entirely of the same opinion. A remarkable instance to show the propriety of the course we are adopting is afforded by the case of Graham *v.* Connell, 19 Law J., Exch. 361, which arose before Lord Wensleydale and Alderson, B., upon the 14th section of the 1 & 2 Vict. c. 110, which renders stock and shares in public funds and public companies, belonging to the debtor, and standing in his own name, liable to be charged by order of a Judge. Entertaining some doubt as to whether or not the shares in question,—shares in a banking company entitled to sue and be sued by a public officer under 7 & 8 Vict. c. 113, s. 47, and 7 G. 4, c. 49, but not registered under the 7 & 8 Vict. c. 110,—were shares in a "public company" within the meaning of the 1 & 2 Vict. c. 110, s. 14, those learned Judges declined to set aside the order. A bill was afterwards filed; and, after much argument, Lord Cranworth, C., held that they were shares in a public company within the Act. Great injustice would have been done in that case, if the Court of Exchequer had set aside the order, leaving the party without any remedy. We must act upon the same principle here, and leave Mr. Holden to his application to the Court of Chancery, where the decision *may be appealed against, if necessary and he should think it expedient. [*650

KEATING, J.—I agree with the rest of the Court that it is not necessary upon this motion to decide whether or not an order or decree for alimony can properly be registered under the 1 & 2 Vict. c. 110. In Pratt *v.* Bull, 32 Law J., Ch. 20, Vice-Chancellor Stuart thought (and

Lord Westbury afterwards agreed with him) that an order under the 25th section of the Probate Act could not be enforced in this way. He says, that, if the legislature had intended that such an order should have "the same force and effect" as a judgment of a superior Court of common law, they would probably have said so. Now, although the 52d section of the Divorce Act has not those words, yet it has the words "shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution." It is, however, unnecessary that we should decide as to the effect of those words. That may be more conveniently left to the Court of Chancery, where the parties may have an appeal, if necessary.

Rule discharged.

*651] *SNELL *v.* FINCH. *Jan.* 23.

S., the lessee of premises, granted an underlease to S., and then mortgaged the premises to H., and afterwards sold the equity of redemption to F. F. paid off the mortgage, obtaining from the mortgagee an authority to receive the rent and an undertaking to execute a conveyance when required, and, before the execution of the conveyance to him, F. distrained for rent accruing in his time:—

Held, upon the authority of Trent *v.* Hunt, 9 Exch. 14,† that the distress was lawful.

THIS was an action of trespass for an illegal distress. Plea, not guilty.

The cause was tried before Bramwell, B., at the last Assizes at Guildford, when the following facts appeared in evidence:—Certain land at Stockwell had been leased to one Meads, for ninety-nine years. Meads underlet to one Wilson for eighty years, and Wilson proceeded to build on the land; but, becoming pressed for money, he obtained an advance from one George Snell, to whom he executed by way of security a bill of sale of certain bricks and other building materials which he had brought upon the premises for the purpose of building. On the 13th of March, 1862, Meads mortgaged his interest in the lease to one Hall, by way of demise for the whole of his term less two days; on the 14th he executed a second mortgage, by way of demise of the term less one day, to T. Snell and G. Hall; and on the 15th, he sold the equity of redemption to the defendant, Finch. Finch paid off the two mortgages, but got no conveyance, but merely an undertaking from the solicitors on the part of the first mortgage to execute a proper conveyance to him, and an authority to receive the rent in the mean time. No reassignment or transfer was ever executed. Rent being in arrear, Finch distrained in the name of Hall, but for his own benefit, upon the property which had been conveyed by the bill of sale to George Snell.

On the part of the plaintiff, it was insisted that the distress was illegal, the reversion immediately expectant on the determination of Wilson's estate, and the only one upon which a distress could be founded, being in Hall.

*652] *On the other hand, the distress was justified under the authority of Trent *v.* Hunt, 9 Exch. 14,† where it was held, that, if a lessor, having mortgaged his reversion, is permitted by the

mortgagee to continue in the receipt of the rent incident to that reversion, he, during such permission, is presumptione juris authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name, as his bailiff.

The learned Baron directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter it for him for 47*l.*, the value of the goods distrained, if the Court should be of opinion, under the circumstances, that the defendant had no legal right to distrain.

Holl, in Michaelmas Term last, obtained a rule nisi accordingly, "on the ground that the defendant had no legal reversion entitling him to distrain on the premises in question, and no implied authority to do so in the name of the legal reversioner."

Willoughby now showed cause.—It may be conceded that the defendant had no legal reversion to entitle him to distrain in his own name: but, having paid off the mortgages, and obtained from the first mortgagee an undertaking to execute the proper conveyance to him, and an authority to receive the rent in the mean time, he had an implied authority to do all that was necessary to enforce payment of the rent. Trent *v.* Hunt, 9 Exch. 14,† is exactly in point; the only difference between that case and the present being, that, here, the defendant is assignee of the mortgagee, and there the defendant was assignee of the mortgagor. In delivering the judgment of the Court in that case, Alderson, B., after observing upon the peculiar relation *of mortgagor and mortgagee, proceeds to say: "The law upon this subject is now pretty clearly established; but, as [*653 regards the present question, we cannot discover any direct authority; and it is not surprising that it should be so, for, in truth, the allegation that the person distraining was bailiff of the party to whom the rent was alleged to be due, was rarely if ever denied, and so the question was not likely to have arisen. The question, therefore, must be now decided upon principle. The first case to be considered, is, where a man in actual possession of land mortgages it in manner before mentioned, and continues to occupy and enjoy the profits of it just as before. So far as regards the possession of the land, this man is not even tenant at will to the mortgagee,—Moss *v.* Gallimore, 1 Dougl. 283,—but he receives the profits of the land for his own use, and not as agent or bailiff of the mortgagee, and, when he has once received them, is absolutely entitled to keep them as his own. The second case is where a man in actual possession of the land mortgages it, and afterwards demises it to a tenant at a rent. In this case, the demise is absolutely void as against the mortgagee, but nevertheless it is good as between the mortgagor and his tenant, until the mortgagee interferes. And the mortgagor is entitled to receive the rent for his own absolute use, and distrain for it in his own name if not paid when due. The third case is the present one. Here, a man has demised to a tenant at a rent, and then has mortgaged his reversion in the usual manner. It is perfectly clear that the operation of the mortgage is here to transfer to the mortgagee the reversion expectant upon the term demised, and with it the rent; and that the mortgagee is the owner in law of the reversion and all its incidents, of which the rent is one, and that any action for the rent must be brought in his

*654] name, he *being the legal owner of it: Doe d. Marriott v. Edwards, 5 B. & Ad. 1065 (E. C. L. R. vol. 27). But, instead of giving notice to the tenant to pay the rent to himself, he permits the mortgagor to go on receiving the rent as before, never interferes with the tenancy at all, but receives the interest upon his mortgage-money as on an unsecured debt. It is quite clear that the tenant, under such circumstances, is perfectly secure in paying his rent to the mortgagor (4 Anne, c. 16, s. 10). It is also quite clear that the mortgagor, when he receives the rent, does so for his own absolute use, and not for the use of the mortgagee. And the question is, whether, under such circumstances, there is evidence to go to the jury, that, in the event of the rent being in arrear, the mortgagor has authority from the mortgagee to make a lawful distress in his (the mortgagee's) name for the rent due. The circumstances show that the real owner of the rent (the mortgagee) is willing that the mortgagor should receive the rent, and have it for his own absolute use. He also expects, of course, that the interest due to him will be regularly paid: and one most obvious and natural source for the mortgagor to obtain funds to enable him to pay this interest, is, the rent of the mortgaged property: and we therefore think that it is the reasonable and proper inference to draw from these facts, that the mortgagee gives (in order to the due payment of the interest to himself) authority to the mortgagor, if the rent be not paid, to make a lawful distress to enforce its payment. This would assist in enabling him to pay the interest to the mortgagee. Indeed, we think this is one of the inferences or presumptions which the Judge, in the absence of evidence to the contrary, ought to advise or direct the jury to make, like the presumptio juris of the Roman law." It is impossible to find any sound distinction between that case and the present.

*655] *Holl*, in support of his rule.—Trent *v.* Hunt is inconsistent with principle and also with the decision of this Court in Ward *v.* Shew, 9 Bingh. 608 (E. C. L. R. vol. 23), 2 M. & Scott 756 (E. C. L. R. vol. 28), which, though cited in argument, was not noticed by the Court in giving judgment. The decision occasioned much surprise at the time. [WILLES, J.—So did that of Shelley's Case, 1 Co. Rep. 93 b.] The judgment in Trent *v.* Hunt is put entirely on the ground that the mortgagor, who mortgaged after the creation of the tenancy, and was allowed to remain in possession, must be presumed to have had authority from the mortgagee to receive and to distrain if necessary for the rent,—it being to the interest of the mortgagee that the mortgagor should have power to enforce payment of the rent which formed the fund out of which the interest of the mortgage-debt was to be paid. Ward *v.* Shew is not distinguishable in principle from Trent *v.* Hunt. It was there held that an authority to tenants "to pay rent to J. S., whose receipt shall be their discharge," did not entitle J. S. to distrain, although he received the rents for his own benefit. Tindal, C. J., there says: "The only effect of the memorandum is, to discharge the tenants as to the assignees, if they should think proper to pay their rents to Shew. The consequence of holding it to confer upon him the authority of a receiver would be to expose the assignees to heavy responsibilities for acts done by him after they had parted with their interest in the premises

to the bankrupt. Instruments conferring authorities of the nature contended for on the part of the defendants must be construed strictly." And Alderson, J., says: "The instrument contains an authority to the tenants to pay, and to the defendant to give a discharge, and all powers necessary for those purposes are implied in that authority; but the authority for which the defendant contends is one which *would render the assignees responsible to the tenants in respect of all acts done by the defendant. That would be an [*656 authority much larger than is necessary for the purpose of receiving rents." This Court, therefore, is not estopped from considering whether or not Trent *v.* Hunt was well decided in principle. Assuming that case to be good law, it is distinguishable from this, on the ground that there was an implied agency there, which is wanting here. [WILLIAMS, J.—The defendant here represents the mortgagor: the mortgagee does not do anything to enforce his rights.] There was no evidence that the mortgagor had received rent after the mortgage. [ERLE, C. J.—I should presume that the rent had been paid down to the last half-year.] If the defendant relied upon being quasi mortgagor in possession, he should have made it out. The undertaking given on the part of the first mortgagee is nothing more than an undertaking to do what a Court of equity would have compelled him to do.

ERLE, C. J.—I am of opinion that this rule should be discharged. The distress in question was made after a demise by Meads to Wilson and a mortgage by Meads to Hall, and a conveyance of the equity of redemption by Meads to Finch, and an agreement to assign by Hall to Finch; so that, when Finch distrained, he had all the beneficial rights of the mortgagor and the mortgagee: and he distrained in the name of Hall, in whom the legal title was then vested. I think the case of Trent *v.* Hunt, 9 Exch. 14,† lays down a principle which entitles the defendant to maintain the validity of this distress. There, there was a mortgage, and the mortgagor, who was suffered to remain in possession, distrained upon the tenant in the name of the mortgagee: and the Court of Exchequer upheld the distress. It seems to me that that was an extremely *salutary judgment, because it placed the decision of the Courts of law in accordance with the [*657 ordinary course of the transactions of mankind. In the common case of a mortgage, the mortgagor means to remain in possession, and the mortgagee means to hold the assignment as security for the principal sum and interest, leaving the mortgagor in the full exercise of all his rights as landlord. When a tenant omits to pay his rent, one remedy for its recovery is the power of distress, which must be made in the name of the legal owner of the reversion. And the Court of Exchequer in that case said, that, the mortgagor being left in possession and receipt of the rent, they would presume that he had an implied authority from the mortgagee to enforce payment of it by distress. The principle of that case applies here. Indeed, the defendant's case here appears to me to be a stronger one. Having purchased the equity of redemption, he pays off the mortgage, whereby all the rights which were vested in the mortgagee become vested in him, and he takes an authority from the mortgagee to receive the rents, and an undertaking that he will, when called upon, execute a conveyance and complete

the legal title. If Finch had got that conveyance, it would not have altered the plaintiff's position in the least. The case of Trent *v.* Hunt seems to me fully to warrant our present decision. The case of Ward *v.* Shew is entirely different in principle. All that was held there, was, that a mere authority to receive rents does not warrant the party so authorized in distraining for them.

WILLIAMS, J.—I am of the same opinion. No doubt there are difficulties in the way of implying an authority from a mortgagee to the mortgagor to distrain in his name; because, if you imply an *658] authority in the *mortgagor to distrain in the name of the mortgagee, and so constitute himself bailiff of the mortgagee, the consequence would be that the latter might be made liable for any excess of which the former might be guilty in conducting the distress. But all that difficulty was encountered and got over by the Court of Exchequer in Trent *v.* Hunt. The present case is a much stronger one in favour of implying authority than that was; for, here you have the mortgagee giving to one who has purchased the equity of redemption, and so clothed himself with all the rights of the mortgagor, an authority to receive the rents, and an undertaking to execute a proper conveyance when called upon so to do. It would be gross injustice if he did not under such circumstances authorize the party to adopt the usual remedies for enforcing payment of the rents. I therefore feel far less difficulty in implying such an authority here than I should have done in Trent *v.* Hunt.

WILLES, J.—I am of the same opinion. The case of Trent *v.* Hunt certainly does at first sight seem to involve some difficulty. And I think the authority to be implied must be an authority limited to a distress upon a lawful occasion. The mortgagee has a remedy against his bailiff for any excess; and that would come into the account between the mortgagor and the mortgagee. Upon consideration, I think the decision in Trent *v.* Hunt is a sound and sensible one, and one which reconciles all the difficulties which have been suggested. I agree that this is a stronger case than the ordinary one of mortgagor and mortgagee: and I think we should be coming to a very unsatisfactory decision if we were to yield to the argument of Mr. *Holl.*

*659] KEATING, J.—I am of the same opinion. We are *bound by the authority of Trent *v.* Hunt. The facts of this case are much stronger than those of that case: but the principle is the same, and is one which I entirely approve. The decision was come to after very great consideration. Rule discharged.

FISCHER *v.* HAHN. *Jan.* 30.

An order for the examination of witnesses under the 1 W. 4, c. 22, may be obtained before issue joined.

But, where an order was sought for the examination of the plaintiff as a witness on his own behalf, on the ground that he was about to go abroad, the Court, besides requiring the plaintiff to give security for costs, and imposing other special terms, required a further affidavit showing that the application was made bonâ fide.

HONYMAN, on a former day in this term, moved for a rule for the

examination of the plaintiff vivâ voce before one of the Masters, as a witness on his own behalf in this cause, under the 1 W. 4, c. 22. The affidavit upon which the motion was founded, which was made by the managing clerk of the plaintiff's attorneys, was as follows:—"1. This action is brought to recover damages sustained by the plaintiff in consequence of a loss by robbery of property belonging to the plaintiff while he was remaining as an inmate or guest at the house of the plaintiff, who is the keeper of an hotel in America Square, London. 2. I am advised and believe that the plaintiff is a material and necessary witness on his own behalf in support of his case in this action, and that the trial thereof cannot safely be proceeded with without the evidence of the said plaintiff. 3. The said plaintiff is a foreigner, and is now in England for a temporary purpose only; and I have been informed and believe that he is about to proceed on or before Saturday next (Jan. 31) to the West Indies, and that it is not probable that he will return to this country in time to attend as a witness on the trial of this cause. 4. I am advised and *believe that the said plaintiff has a good cause of action upon the merits against the said defendant." [*660

The application had been made to Byles, J., at Chambers, but refused, on the grounds that issue was not joined,(a) and that the plaintiff, having control over the cause, need not bring it on for trial until his return from the West Indies. [ERLE, C. J.—The affidavit is certainly very bare of information.] In Braun *v.* Mollett, 16 C. B. 514 (E. C. L. R. vol. 81), a Judge at Chambers having made an order for the vivâ voce examination of the plaintiff before issue joined, upon an affidavit which merely stated that he was a master mariner, that his evidence was material and necessary, and that he was about to sail for Stettin, and was not likely to be back in time for the trial,—the Court refused an application to set it aside. [ERLE, C. J.—Who made the affidavit there?] The broker for the ship.

A rule nisi having been granted with manifest reluctance on the part of some members of the Court,

R. E. Turner now showed cause.—He submitted that the motion was premature, and the affidavit unsatisfactory. An order for examination either vivâ voce or upon interrogatories is not usually granted before issue joined. [WILLES, J.—Do you suggest that the application is made with an improper object?] No. [WILLES, J.—The mere fact that issue has not been joined clearly is no ground of objection. It was considered no objection in Braun *v.* Mollett, 16 C. B. 514 (E. C. L. R. vol. 81). The Court of Queen's Bench were of the same opinion in Fynney *v.* Beasley, 20 Law J., Q. B. 395.] At all events, the plaintiff himself should make an affidavit: here, we have only the affidavit of the attorney's clerk. [WILLES, J.—In Braun *v.* Mollett there was *only the affidavit of the ship's broker.] At all events, the plaintiff should be compelled to give security for costs. [WILLES, J.—The usual order is, that the plaintiff give security for costs, to the satisfaction of the Master, within a week.] [*661

ERLE, C. J.—I am inclined to think, as my Brother Bylcs did, that the affidavit is insufficient; and I should be very unwilling to

(a) The declaration had not been delivered.

go beyond the precedent established by the case of Braun *v.* Mollett. The plaintiff should satisfy us that the voyage he is about to go upon is one of necessity, and not a mere pretext for evading an examination in open Court. As, however, the matter presses, the rule may go, subject to the Court or a Judge being satisfied by affidavit that the application is made bonâ fide,—the rule to be quashed if such an affidavit is not produced. The costs of the examination will be costs in the cause for the defendant, but not plaintiff's costs in the cause unless the Judge who tries the cause shall so think fit.

The rest of the Court concurring, the rule was drawn up as follows:—

"It is ordered that the plaintiff be examined vivâ voce before one of the Masters of this Court, as a witness on his own behalf in this cause; and that the said plaintiff do within a week give or enter into such security as shall be approved of by one of the Masters of this Court, in case the parties differ about the same, for payment by the said plaintiff to the defendant or his attorney, of the defendant's costs of this action, to be taxed by such Master, in case the plaintiff shall become nonprossed or nonsuited in this action, or shall discontinue the same, or a verdict shall be found for the defendant on the trial of this cause: And, in default of such security being given or entered
*662] into as *aforesaid, then it is ordered that all further proceedings in this cause be stayed:(*a*) And it is further ordered that the plaintiff do produce to the defendant's attorney in this cause to-morrow an affidavit in support of the plaintiff's application to be examined as aforesaid; the defendant being at liberty, if he shall think it necessary, to refer it to one of the Judges of this Court to decide on the sufficiency of the same: And, in the event of the said affidavit being deemed insufficient by the said Judge, then it is ordered that the examination so to be taken as aforesaid shall not be used on the trial of this cause: And, lastly, it is ordered that the costs of and occasioned by the said examination shall be defendant's costs in the cause, but that the same shall not be costs in the cause for the plaintiff, unless the Judge who tries the same, or some other Judge, shall so order."

The affidavit which was afterwards filed, and deemed satisfactory, was the joint affidavit of the plaintiff and his attorney's managing clerk. The latter repeated the statements contained in his former affidavit, and the former deposed as follows:—"I am now merely staying in London on my way to Cuba, where I intend to reside per-
*663] manently, as I have *obtained an appointment which will require my residence there; and I shall leave London for Cuba aforesaid early in the ensuing week; and I have no intention of returning to England."

(*a*) Security for costs was not given within the time specified in the rule: but, after the expiration of the week, the plaintiff's attorneys offered to pay into Court the sum fixed as the amount of the security. The Master, however, declined to receive it without the direction of the Court, conceiving that by the terms of the rule, security not having been given within the week, the proceedings were stayed absolutely.

In the ensuing Term, *Honyman* applied for and obtained a direction to the Master to receive the money,—the Court saying that the intention of the rule was that it should operate as a stay of the proceedings *until* security was given.

TRICKETT *v.* TOMLINSON and Others. *Jan.* 15.

A dispute having arisen between the plaintiff and the defendants as to whether or not certain granite which had been prepared by the former for a work which was in the course of construction by the latter, was according to contract, the plaintiff wrote to the defendants, "I have seen Mr. E., and he has kindly consented to see you on the subject of the granite for Merthyr Tydfil, and *I have authorized him to do so, and if possible come to some amicable arrangement in the matter.*"

E. having agreed with the defendants that they should have the granite for 50*l.*, the contract price being 121*l.* 16*s.* 11*d.*,—Held, that it was not competent to the plaintiff afterwards to repudiate the act of E., on the ground that he had given him secret instructions not to settle for less than 100*l.*

THIS was an action brought to recover the price of certain granite sold by the plaintiff to the defendants.

The defendants pleaded,—first, except as to 50*l.*, never indebted,—secondly, payment before action,—thirdly, a set-off—fourthly, payment of 50*l.* into Court.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term. The facts which appeared in evidence were in substance as follows:—The plaintiff was the owner of a quarry, and the defendants were the contractors for the formation of works for the supplying of water to the town of Merthyr Tydfil under the local board of health. Messrs. Evans, Brothers, the former contractors for the work (who had become bankrupt), had agreed for the purchase from the plaintiff of a quantity of granite coping to be used in the work. The defendants having taken upon themselves the performance of Messrs. Evans's contract with the local board, a correspondence ensued between them and Evans, Brothers, and the plaintiff, as to the purchase of the granite coping by them, and ultimately a price was agreed upon: but, when the granite arrived at Briton Ferry, it was found to be cut *or axed to a radius of 24 feet instead of 96 feet, as the defendants contended it should have been, according to the model and instructions sent, and therefore they refused to receive it. A long correspondence then ensued between the parties: and, on the 12th of March, 1861, the plaintiff wrote to the defendants as follows,— [*664

"I have seen Mr. Joseph Evans, of the late firm of Evans, Brothers, and he has kindly consented to see you on the subject of the granite for Merthyr Tydfil; and I have authorized him to do so, and if possible come to some amicable arrangement in the matter. As there is plenty of stone, a slight alteration of joints and face is all that is required."

On the 18th of March, Mr. Joseph Evans went to Merthyr Tydfil, and agreed on behalf of the plaintiff with the defendants that they should have the granite for 50*l.*; and accordingly the following memorandum was drawn up and signed between them:

"It is hereby agreed between us, the undersigned, Joseph Evans, on behalf of Mr. Trickett, and Samuel Harper, on behalf of Tomlinson, Harper & Harper, that on payment of 50*l.* by the said Tomlinson, Harper & Harper to the said Samuel Trickett, the granite now lying upon the premises of Mr. Young at Briton Ferry, as delivered in November last by the ship Telegraph, shall be the absolute property

of the said Tomlinson, Harper & Harper, and no further claim on account thereof shall be made by Mr. Trickett: in consideration whereof, Samuel Harper agrees to pay Mr. Trickett the sum of 50*l*.

"JOSEPH EVANS.

"SAMUEL HARPER."

On the 24th of March, the plaintiff, having learned the nature of the arrangement made by Evans, wrote to the defendants as follows,

*665] —"I have just seen Mr. *Evans, and I hasten to state that he had no authority from me to make any such arrangement as he says you proposed to him. I hereby repudiate any agreement he may have made, for which he had not my authority."

Evans by the same post wrote to the defendants as follows,—"I have seen Mr. Trickett, and he declines to accept the terms offered by you to me. He also denies having given me his authority to accept any such terms,—which is perfectly true. I must therefore ask you to destroy the memorandum given by me to you, such being now null and void."

The plaintiff at the trial stated, that, before Evans met the defendants, he had instructed him to consent to deduct 20*l*. from the price of the stone (121*l*. 16*s*. 11*d*.), but at all events not to accept less than 100*l*. for it; and this was corroborated by Evans: but there was no evidence that any communication had been made to the defendants that Evans's authority was so limited.

On the part of the defendants, it was insisted, amongst other things, that the plaintiff's letter to the defendants of the 12th of March, 1861, was a distinct intimation to them that Evans had authority to enter into an arrangement which should be binding upon him.

His Lordship, however, thought otherwise; but he reserved the question for the opinion of the Court, as also a question upon the construction of the letters which formed the contract, and the admissibility of certain evidence to explain it.

A verdict having been entered for the plaintiff,

Bovill, Q. C., in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendants, on the ground, amongst others, that the

*666] plaintiff was bound *by the arrangement made by Evans, under which alone the defendants agreed to accept the stone for 50*l*., the sum paid into Court.

Edward James, Q. C., and *J. C. Matthews*, showed cause.—The letter of the 12th of March, 1861, was a mere intimation from the plaintiff to the defendants that he had authorized Evans to negotiate for a settlement of the dispute between them. That could not supersede the instructions which the plaintiff had given to that gentleman, or authorize him to arrange the matter upon any terms he pleased.

Bovill, Q. C., and *D. T. Evans*, in support of the rule.—This is an action for goods sold and delivered upon a promise implied by law from the defendant's acceptance of the goods The evidence showed either that the granite never was accepted at all, or that it was accepted under the agreement made with Evans on the 18th of March, in pursuance of the authority communicated to the defendants by the plaintiff's letter of the 12th. Unless, therefore, Evans had authority to do as he did, this action is misconceived. Having held out Mr. Evans as being authorized to settle the matter on his behalf, the

plaintiff cannot be allowed now to say that he had not such authority: Pickard *v.* Sears, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 488.

ERLE, C. J.—There clearly was enough doubt in this case to warrant the defendants to raise a dispute as to the article sent. While that dispute was pending, the plaintiff writes to the defendants,—"I have seen Mr. Joseph Evans, of the late firm of Evans, Brothers, and he has kindly consented to see you on the subject of the granite for Merthyr Tydfil, and I have authorized him to do so, and if possible come to some *amicable arrangement in the matter." In pursuance of that very general authority, Evans went down to Merthyr Tydfil and arranged with the defendants that they should have the stone for 50*l.* The plaintiff now claims to repudiate the act of Evans, on the ground that he had given him secret instructions not to take less than 100*l.* As, however, those instructions were never communicated to the defendants, they were perfectly justified in treating Evans as a person duly authorized to make such agreement with them as he might think proper. Having held out Evans to the defendants as a person having authority to settle the matter in dispute with them at his discretion, it is not competent to the plaintiff now to turn round and repudiate that authority. Upon this ground, therefore, without saying anything about the other, I am of opinion that the rule should be made absolute. [*667

The rest of the Court concurring,

Rule absolute.

*WARD *v.* BECK. *Jan* 31. [*668

The 66th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), does not preclude the owner of a ship who has executed an absolute transfer of his interest therein, from showing that the real intention of it was to give the transferree only a security by way of mortgage for an advance of money.

THIS was an action upon a policy of insurance for 700*l.* on the ship Eliza Stewart, for twelve months from the 20th of August, 1860, at 6*l.* 6*s.* per cent., "to return 10*s.* per cent. for every uncommenced month in case of transfer of property, or 9*s.* per cent. for every whole month the vessel is laid up."

The declaration stated that the plaintiff had caused the policy to be effected by one Wilkinson as agent for him, and which policy purported to be effected by Wilkinson as well as in his own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all. And it further alleged that the plaintiff was at the time the policy was underwritten by the defendant, and thence until and at the time of the loss thereinafter mentioned, interested in the said ship and premises to the amount of all the moneys so insured thereon by the plaintiff as aforesaid; and that the said insurance was made for the use and benefit and on account of the plaintiff, being so interested as aforesaid.

The defendant pleaded,—first, that the plaintiff did not cause the policy in the declaration mentioned to be made as alleged, and that the same was not made for his use and benefit and on his account, as

alleged,—secondly, that the plaintiff was not at the time of the alleged loss interested as alleged,—fourthly, that it was a condition of the said policy of insurance, that, in case of transfer of the subject-matter of the said insurance, the said insurance should cease, and a proportionate part of the premium be returned by the defendant to the
*669] plaintiff; and that, before the *happening of the loss in the declaration mentioned, the subject-matter of the said insurance was transferred from the plaintiff to one J. S., and thereupon the said insurance wholly ceased and determined.

Upon these and other pleas issue was joined.

The cause was tried before Erle, C. J., at the sittings in London after last Michaelmas Term. It appeared, that, on the 26th of September, 1860, the plaintiff, by bill of sale in the form prescribed by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, transferred his interest in the Eliza Stewart to one Tillman, as security for an advance of 575*l*. At the time of the execution of this bill of sale, nothing was said about the policy. The bill of sale was registered on the 27th of September, and the transferree obtained a new certificate of registry in his own name, and about three weeks afterwards the policy was assigned to him.

Under these circumstances, it was submitted, on the part of the defendant, that the plaintiff, having parted with all his title to the ship by an absolute transfer, had ceased to have any interest in the subject-matter of insurance, and consequently that the defendant was entitled to succeed either upon the second or the fourth issue.

His Lordship directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter it for him, if the Court should be of opinion that either the second or the fourth plea constituted a defence.

Lush, Q. C., on a former day in this term, moved accordingly.—The transfer to Tillman being absolute, the plaintiff's interest in the policy ceased the moment that transfer was made. The question turns upon the construction of the Merchant Shipping Act, 1854. The 55th
*670] section of that Act enacts that "a *registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and shall be according to the form marked E. in the schedule hereto, or as near thereto as circumstances permit, and shall be executed by the transferree in the presence of and attested by one or more witnesses." The bill of sale here was in the form provided by that section. The case of a mortgage is provided for by s. 66, which enacts that "a registered ship or any share therein may be made a security for a loan or other consideration; and the instrument creating such security, hereinafter termed a 'mortgage,' shall be in the form marked I. in the schedule hereto, or as near thereto as circumstances permit; and, on the production of such instrument, the registrar of the port at which the ship is registered shall record the same in the register-book." In Powles *v.* Innes, 11 M. & W. 10,† it was held that a person who assigns away his interest in a ship or goods after effecting a policy

of assurance upon them, and before the loss, cannot sue upon the policy, except as a trustee for the assignee in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit. [WILLES, J.—Although the transfer upon the face of it appears to be absolute, it may be explained to be a mortgage only: Myers *v.* Willis, 17 C. B. 77 (E. C. L. R. vol. 84),—in error, 18 C. B. 886. WILLIAMS, J.—Do you contend that a Court of equity could only look at this instrument as an absolute transfer of the ship, without power of redemption?] Such, it is submitted, is the effect of the statute. In The Liverpool [*671 *Borough Bank *v.* Turner, 29 Law J., Ch. 827, it was held by Vice-Chancellor Wood that a mortgage of a ship must be accompanied with the formalities required by the 17 & 18 Vict. c. 104, and that a Court of equity can give no effect to an unregistered contract to assign a ship as a security for money due. And this decision was affirmed by Lord Campbell, C., on appeal,—30 Law J., Ch. 379. In giving judgment, his Lordship says: "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directly only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed. Looking to the great peculiarity of the terms of transfer and mortgage here required, and the purposes which they were to serve, I cannot doubt that the legislature intended that these and no other forms were to be used. A disclosure of the true and actual owners of every British ship is considered to be of the utmost importance, with a view to the commercial privileges which British ships are entitled to, and still more with a view to the proper use and honour of the British flag. The state can only attain the desired information by the register disclosing the names of the true owners, and by the register being considered by the state the only evidence of ownership. To acknowledge the title of a totally different set of owners from that represented in the register, would, I think, be at variance with the policy, and a violation of the enactments of the legislature." That decision gave rise to a declaratory enactment in the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 3,—"It is hereby declared that the expression 'beneficial interest,' whenever used in the second part of the *principal Act, includes interests arising under contract and [*672 other equitable interests; and the intention of the said Act is, that, without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register-book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property." That, however, cannot apply to this case. At all events, the defendant is entitled to succeed upon the fourth plea. Whatever be the equitable rights of the plain-

tiff, there has been a transfer of the ship within the meaning of the condition in the policy. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the Court.(a)—In this case, Mr. *Lush* in the early part of this term moved to enter a verdict for the defendant in an action upon a policy of insurance, on the ground that the assured had transferred all his interest in the ship, and therefore the policy was at an end. There was a provision in the policy for a return of premium in the event of the transfer of the property in the ship. If it had been necessary to give an opinion upon the construction of that clause, we should probably have thought
*673] that it was not applicable to a case where, *upon a transfer of the interest in the vessel, there had been a contract for the transfer also of the beneficial interest in the policy, but that it was only intended to meet a case which is suggested by Lord Wensleydale in Sutherland *v.* Pratt, 12 M. & W. 16,† viz., a case of absolute transfer of the interest during the risk, without any intention to transfer the beneficial interest in the policy. Of course, without more the policy would in that case come to an end, although the risk continued; and, if it had been necessary to give any opinion upon that point, we should probably have thought that it was introduced for the benefit of the assured, to enable him to obtain a return of premium, in proportion to the unexpired risk, and not to prevent the very ordinary transaction of the transfer of a vessel and with it a contract that the beneficial interest in the policy should pass to the transferree. Mr. *Lush*, however, insisted that that was not the true character of the transaction here, for that the agreement to transfer the policy took place long after the transfer of the ship, and formed no part of that transaction. If we had been compelled to regard the transfer as absolute, the argument would have been conclusive. It appeared, however, that, although the transfer purported upon the face of it to be absolute, it was at the time intended and agreed by the parties to be only by way of mortgage for securing an advance of money made by the transferree to the transferror; and therefore, if this case had arisen before the 17 & 18 Vict. c. 104, s. 66, there can be no doubt that the Court would have been at liberty, notwithstanding the Ship's Registry Act then in force, to look at the real nature and character of the transaction, and to hold, that, although the transfer appeared to be absolute upon the face of it, it was only capable
*674] of being enforced for the purpose of securing payment *of the money advanced, and that, as to anything beyond that, the transferree was in effect a trustee for the transferror; or, in other words, that the transferror had an equity of redemption, and therefore an interest which was insurable. It is unnecessary to go through all the cases which establish that proposition. The last of them,—in which, I believe, all the former decisions are referred to,—is Gardner *v.* Cazenove, 1 Hurlst. & N. 423.†

Mr. *Lush*, however, contended that the 17 & 18 Vict. c. 104, s. 66, not only directed that a particular form of mortgage of ships shall be adopted, but by using the imperative "shall" denoted an intention that no instrument shall have effect as a mortgage which does not

(a) The Judges present at the motion were, Erle, C. J., Williams, J., Willes, J., and Keating, J.

pursue the form thus given. To that argument, even in the absence of any subsequent statute, we should not have felt disposed to yield, because in the 8 & 9 Vict. c. 89, and in the previous Registry Acts on which the decisions in Gardner *v.* Cazenove and the other cases there referred to turned, although there were no direct provisions for the mortgage of a ship, there were provisions by which transfers in the nature of mortgages might be placed upon the register by endorsement. Those provisions would seem equally to point to an intention on the part of the legislature that mortgage transactions should be rendered effectual only in case the directions of the statute were observed; and yet, notwithstanding those provisions, it was held that an absolute transfer might be construed to be a mortgage, if so intended: and we should have felt disposed to put the same construction upon the 17 & 18 Vict. c. 104.

Everybody can understand why transfers are made in this form rather than in the form of mortgages. Merchants are unwilling to appear to be borrowers, and therefore prefer to make absolute transfers, with *an undertaking on the part of the mortgagee that the vessel shall be re-transferred on payment of the sum advanced. [*675 The construction we should have been inclined to put upon the 17 & 18 Vict. c. 104, s. 66, is, that the intention of the legislature was that no instrument should be registered as a mortgage unless it was in the form prescribed; not that, if it were not in that form, no evidence should be admissible to show the real intention of the parties to be that it should operate as a mortgage only, and not as an absolute sale.

But we feel ourselves relieved from the necessity of offering any opinion of our own upon the subject, because we find in the 25 & 26 Vict. c. 63, s. 3, an express enactment which appears to dispose of the case. That is a declaratory enactment, in the most stringent terms, that the intention of the 17 & 18 Vict. c. 104 was, "that, without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register-book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property." The terms of that section are such as to preclude us, from the time of its being passed, from saying that any other was the intention of the legislature.

We have been much pressed with the judgment of Vice-Chancellor Wood, in The Liverpool Borough Bank *v.* Turner, 29 Law J., Ch. 827, where that learned *Judge (whose judgment was affirmed on appeal) held that a mortgage of a ship must be accompanied with [*676 the formalities required by the 17 & 18 Vict. c. 104. In that judgment we entirely concur. The question there arose upon a bill filed to compel the specific performance of an unregistered contract to execute a mortgage of a ship in futuro as a security for an advance of money. If, therefore, the Court of Chancery had decreed performance of that

contract, it would in effect have been saying that an unregistered contract which the legislature has declared shall not operate as a transfer of a ship, shall by the assistance of the Court of Chancery become a valid transfer. The case now before us is a case of a complete transfer: and the only question is whether there is anything in the statute which prevents us from allowing that which was the real intention of the parties, viz. that the instrument should operate as a security only for the money advanced, the absolute interest remaining in the transferror, to prevail. We are clearly of opinion that the matter stands upon the same footing as it did before the passing of the statute relied on by Mr. *Lush*, that an interest still remained in the transferror, and that neither by the general law nor by reason of the special clause in the policy has that interest been at all affected. The rule, therefore, must be refused. Rule refused.

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*677] *KENNEDY *v.* BROUN and Wife. *Jan.* 16.

A promise made by a client to pay money to a counsel for his advocacy, whether made before or during or after the litigation, has no binding effect.

The relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation.

A claim which is absolutely void by reason of an illegality or immorality in the consideration, cannot be relied on in support of a count upon an account stated.

An action founded upon an account stated fails if any one of several claims of undefined amount included in it is to be omitted.

THIS was an action for money alleged to be due from the defendants to the plaintiff upon accounts stated with the female plaintiff before her marriage.

The defendants pleaded,—first, never indebted,—secondly, payment before action,—thirdly, that the action was brought for the recovery of fees, charges, and disbursements for business done by the plaintiff as an attorney, &c.,—fourthly, that the accounts were stated of and concerning moneys claimed by the plaintiff for and in respect of work, journeys, care, skill, and attendances done, bestowed, and applied, and moneys paid by the plaintiff for the defendant Patience Broun, formerly Swinfen, whilst she was unmarried, in pursuance of divers illegal agreements before then made between them, for the unlawful maintenance by the plaintiff of the said Patience Swinfen in and about divers actions, suits, and proceedings at law and in equity touching and relating to certain lands, tenements, and other property claimed by her, and which in no way belonged to the plaintiff, and wherein he the plaintiff had no right, estate, title, or interest, contrary to law, &c.

The plaintiff replied that no agreement for unlawful maintenance was made as alleged, nor was any account stated as alleged in the fourth plea. Issue thereon.

The cause was tried before Cockburn, C. J., at the last Spring Assizes, 1862. The facts which appeared in evidence were in substance as follows:—In the year 1855, the female plaintiff, then Mrs. Swinfen, was in possession of an estate in the county of Stafford under the will of her late husband's father; and, proceedings having been

instituted at the suit of the heir *at law of the testator, who impeached the will, on the ground of undue influence and [*678 fraud, an issue was directed by the Court of Chancery to try the validity of the devise. That issue came on for trial before Cresswell, J., at the Spring Assizes at Stafford, in 1856, when an arrangement was made by the respective counsel, the substance of which was that the estate should be given up to the heir at law, subject to an annuity of 1000*l.* to Mrs. Swinfen for her life. This compromise was embodied in an order which was afterwards made a rule of Court, and sought to be enforced by attachment, Mrs. Swinfen declining to accept the compromise, on the ground that it had been made without her consent and in defiance of her express directions to the contrary, and that, even if it were competent to counsel to compromise in an ordinary case, no such authority could exist in the case of an issue directed for the purpose of informing the conscience of the Court of Chancery. This Court having refused to grant an attachment,—see Swinfen *v.* Swinfen, 18 C. B. 485 (E. C. L. R. vol. 86), 1 C. B. N. S. 364 (E. C. L. R. vol. 87),—and proceedings in Chancery to compel Mrs. Swinfen to carry into effect the compromise having also failed, the issue went down a second time for trial at the Summer Assizes at Stafford in 1858, when Mrs. Swinfen obtained a verdict, which the Court of Chancery refused to disturb, and consequently Mrs. Swinfen retained possession of the estate,—a result for which she was unquestionably indebted to the strenuous and able exertions of the present plaintiff.

The plaintiff's claim under the account stated rested upon his own testimony, coupled with various letters addressed to him by the female defendant during the progress of the proceedings. The plaintiff, it appeared, was first introduced to Mrs. Swinfen in April, 1856, when, being dissatisfied with her then legal advisers, *she asked his advice concerning the compromise. At first he [*679 advised her to submit; but, upon further consideration, she at his suggestion determined to resist, and engaged his services, with the result already mentioned. Urged by her, the plaintiff left Birmingham, where he had established himself in practice as a barrister, and took chambers in the Temple for the purpose of assuming the entire control over the proceedings as her counsel, he at this time receiving no fees, but trusting to repeated general promises on the part of Mrs. Swinfen to compensate him generously for all his exertions and sacrifices on her behalf,—telling him on one occasion, just before the second trial, that "she felt confident of winning, that she would make him a rich man, and that it would be worth 20,000*l.* to him;" and again, when the verdict had been obtained, that, "he had won the 20,000*l.*," and promising to make a settlement on him; and, after the refusal of the Master of the Rolls to grant a new trial, she again said to him "Your 20,000*l.* is safe now." In March, 1859, the plaintiff pressed Mrs. Swinfen to give him some security for the promised remuneration, reminding her of the sacrifices he had made for her,—alluding to his having given up his practice at Birmingham. Towards the end of April in that year, in a conversation which he had with Mrs. Swinfen, the plaintiff said: "You know I have never asked you for any writing to confirm your promises; but I think it right for the

sake of my family. Let us understand one another. What do you mean to give me? You have several times mentioned 20,000*l.*; do you consider that you owe me that?" To this Mrs. Swinfen replied: "Certainly. But you know you cannot have it at present." To which the plaintiff rejoined: "I am aware of that: but you ought to give me some security." After some further conversation, and taking
*680] time to consider, *Mrs. Swinfen agreed to grant the plaintiff the reversion of the estate charged with 20,000*l.*; and this arrangement was subsequently carried out by a deed of the 10th of May, 1859.(a) The value of the estate was about 60,000*l.*; and the present estimated value of the deed, assuming it to be a valid security, was between 15,000*l.* and 16,000*l.* The plaintiff estimated the loss he had sustained by abandoning his practice at Birmingham at about 10,000*l.* The fees he had received as counsel in the course of the proceedings in the Swinfen case were about 700*l.*

The defendant, who was examined at great length, contradicted every statement made by the plaintiff as to the promises of remuneration.

It was objected on the part of the defendants that the evidence did not sustain the account stated, the language relied on by the plaintiff for that purpose being nothing more than expressions of grateful recognition by the defendant of services rendered, not amounting to or intended to constitute a contract; and, further, that there could be no legal liability arising out of a contract void by reason of the law against champerty.

The Lord Chief Justice declined to nonsuit the plaintiff, but reserved to the defendants leave to move; and, in summing up, he said: "You have been truly told by the defendants' counsel that you cannot take into consideration the services which have been rendered. The only claim of the plaintiff is upon an account stated, which can only be supported by an admission by the defendants of an existing debt. Whether, if you give your verdict for the plaintiff, it can be
*681] upheld, is a matter which it is not necessary to discuss *to-day. My opinion on the law is adverse to the plaintiff. Whatever he did as attorney would fall to the ground. What he did was done as counsel: and it has been laid down by the highest authority that a barrister can maintain no action for his fees: they are of an honorary character. It is impossible to doubt the propriety and expediency of this rule. The question which you have to decide, is, not whether the contract on which the alleged account was stated was a legal contract, but whether the female defendant did in point of fact acknowledge the existence of this debt,—whether there was a contract for the services before they were performed, and a subsequent acknowledgment of liability." His lordship then proceeded to comment on the material parts of the evidence given by the plaintiff and defendant respectively, and continued,—"The question which you are to consider, is, which of the two speaks the truth. The plaintiff swears that the female defendant promised him 20,000*l.*, that she fixed that sum, and admitted that she owed the plaintiff that amount. She, on the contrary, altogether repudiates her liability, and denies that she

(a) Proceedings are now pending in Chancery to set aside this deed, as being contrary to public policy.

made any such acknowledgment or promise." And he concludes thus,—"As I have told you, the question is whether the female defendant made any express admission of an existing debt to the amount stated by the plaintiff. If you believe his statements, he will be entitled to your verdict. If, on the other hand, her evidence has satisfied you that his statements as to what passed between them upon the subject are not founded in truth, then your verdict will be for the defendants."

The jury returned a verdict for the plaintiff, damages 20,000*l.*

Macaulay, Q. C., in Easter Term last, obtained a rule *nisi [*682 to enter a verdict for the defendants, pursuant to the leave reserved, on the grounds,—first, that the account relied upon was of a matter in respect of which no legal liability existed,—secondly, that it was stated concerning alleged debts and contracts which were contrary to law,—thirdly, that there was no debt upon an account stated established by the plaintiff's evidence; or for a new trial, on the ground,—first, that the verdict was against the weight of evidence,—secondly, that the Lord Chief Justice did not leave to the jury any other question than whether they believed the version of the alleged promises given by the plaintiff or that given by the female defendant. He submitted, that, to form the foundation of an account stated, there must be some antecedent legal liability: Cocking *v.* Ward, 1 C. B. 858 (E. C. L. R. vol. 50); Porter *v.* Cooper, 1 C. M. & R. 387;† Lemere *v.* Elliot, 6 Hurlst. & N. 656;† that a bargain between counsel and client for remuneration for services, whether before or during or after the litigation, is contrary to public policy, and void: Veitch *v.* Russell, 3 Q. B. 928 (E. C. L. R. vol. 43): that the contract relied on by the plaintiff was void on the ground of maintenance: 2 Inst. 563; Earle *v.* Hopwood, 9 C. B. N. S. 566 (E. C. L. R. vol. 99): and that the Lord Chief Justice, instead of leaving to the jury the naked question whether they believed the plaintiff or the female defendant, ought to have told them that the plaintiff's evidence, even if believed, disclosed no precedent legal debt which could be the foundation for an account stated.

Kennedy at various times in Trinity and Michaelmas Terms showed cause.—The only question which is open to the defendants upon this rule, is, whether there was a good account stated, and whether there was a valid substratum for it in the right of a *barrister to [*683 maintain an action for a stipulated remuneration for services rendered. There is no foundation for saying that the Lord Chief Justice misdirected the jury. Where counsel at the trial elect to rely on a matter which is reserved by the Judge as a question of law, they cannot afterwards object that it was not presented to the jury as a question of fact: Brown *v.* Storey, 1 Scott N. R. 9; Reeve *v.* Bird, 1 C. M. & R. 31;† Hazeldine *v.* Grove, 3 Q. B. 997 (E. C. L. R. vol. 43); Morgan *v.* Couchman, 14 C. B. 100. Nor is it any ground for a new trial that the Judge omits to notice a point to which his attention has not been called: Robinson *v.* Gleadow, 2 Scott 250; M'Cullagh *v.* Green, 1 Alcock & Nap. 5; or that the Judge leaves to the jury the question which has been raised by the parties themselves, and abstains from putting any other to them: Gregory *v.* The Duke of Brunswick, 3 C. B. 481 (E. C. L. R. vol. 54), 1 D. & L. 803; Martin *v.* The

Great Northern Railway Company, 16 C. B. 179 (E. C. L. R. vol. 81); Horler *v.* Carpenter, 3 C. B. N. S. 172 (E. C. L. R. vol. 91).

The objection on the score of champerty is not open to the defendants. Such a defence, since the new rules, must be pleaded specially: and, assuming that it could be given in evidence under the plea of maintenance,—which it would seem from Rastell's Entries, *Maintenance*, it could not,—that plea was distinctly abandoned at the trial. The facts did not warrant a charge of champerty. By the Statute of Westminster, 13 E. 1, c. 25, it is enacted that "no minister of the King shall maintain suits for lands, tenements, or other things, to have part or profit thereof by covenant made between them." And by 28 E. 1, c. 11, it is further enacted that "no officer, nor any other, for to have part of the thing in plea, shall take on him the business that is in suit; nor none upon any such covenant shall give up his right to another." To constitute an offence under these statutes, there must be a contract between *the parties. Champerty is thus *684] defined in 2 Inst. 208,—"a bargain to have part of the thing in suit, if he prevail therein, for maintenance of him in that suit." To the same effect is the Digest,—"Qui improbe coeunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicetur, lege Juliâ de vi privatâ tenetur." In 2 Inst. 564, it is said: "If a serjeant take a feoffment hanging the plea, or the like, to maintain the tenant, in lieu of his fee, though it be pro suo dando, yet it is champerty:" he cannot "contract to have any part of the thing in demand after the recovery. Penrose's Case maketh not against this; for, there the case was, that, in a writ of champerty, Penrose said that he was of counsel with the party which recovered, and had that land for his wages; but the taking of the land for his wages after the recovery could be no champerty, unless there had been a covenant or promise hanging the plea." In Hawkins's Pleas of the Crown, Book 1, c. 84, it is laid down that "such grants only of part of the thing in suit which are made merely in consideration of the maintenance are within the meaning of the statute, and not such as are made in consideration of a precedent honest debt, which is agreed to be satisfied with the thing in demand when recovered." So, in Harvey *v.* Bateman, Noy R. 52, it was held, that, if one assigns an obligation for a precedent debt it is no maintenance; if for a consideration then given by way of contract, it is. In all the cases, champerty has been held to arise out of a contract, before or during the suit, to receive a part of the thing in suit, or a profit out of it: as, where a man agreed to communicate information to enable another to recover money, on condition of receiving an eighth of the sum recovered: Stanley *v.* Jones, 7 Bingh. 369, 5 M. & P. 193; or, *where a seaman agreed to sell his chance of *685] recovering prize-money to his agents, who were to carry on the suit: Stevens *v.* Bagwell, 15 Ves. 139; or, where an attorney obtained from his client conveyances of land in litigation: Wood *v.* Downes, 18 Ves. 126; Simpson *v.* Lamb, 7 Ellis & B. 84 (E. C. L. R. vol. 90); or contracted for dividing the proceeds of a suit: Re Masters, 4 Dowl. P. C. 18; Strange *v.* Brennan, 10 Jurist 649; or for a remuneration proportioned to the sum recovered: Earle *v.* Hopwood, 9 C. B. N. S. 566 (E. C. L. R. vol. 99). An attorney may pendente

lite take a conveyance as a security for his costs: Anderson *v.* Radcliffe, E. B. & E. 806. Lord Nottingham, in a case of Penrice *v.* Parker, Nelson 75, Cas. Temp. Finch, 75, held it to be maintenance in a barrister to contract to be paid in the event of success. The reports of this case are very unsatisfactory, and the decision questionable. There is nothing in what took place in October, 1856, or in February or March, 1857, to render this contract in any degree illegal. It was a contract for remuneration for services and compensation for losses irrespective of any event, and without reference to any particular fund.

Then, as to the question reserved by the Lord Chief Justice, viz., whether there was a valid contract, and whether there was an account stated. The plaintiff's claim may be said to rest upon three distinct grounds,—one, upon his right to recover under the rule laid down in Lampleigh *v.* Brathwait, Hob. 105, that a voluntary courtesy, moved by a precedent request, will uphold a subsequent promise of payment,—the second, that he had a good right of action upon the defendant's promise to compensate him for loss and damage, irrespectively of the claim for services as counsel,—thirdly, that remuneration for his services as counsel is recoverable under the express contract.

1. Lampleigh *v.* Brathwait, Hob. 105, is a leading *case upon this subject. There the defendant had asked the plaintiff to go to the King and solicit a pardon: the plaintiff did so, and the defendant then promised to pay him 100*l.* for his trouble: and it was held that this entitled him to maintain an action. Numerous cases have since been decided in accordance with the law thus laid down, viz. that an executed consideration, if in pursuance of a previous request, will support an express promise to pay: as, for instance, Harris's Case, 3 Dyer 272 a, n. 31, where a man took an apprentice at another's request; Sidnam *v.* Worthington, Cro. Eliz. 42, where a man served another for a year, at his request; Townsend *v.* Hunt, Cro. Car. 408. where he had executed a release; Bosden *v.* Thinne, Yelv. 40, where the plaintiff had procured credit and become bound for a third person, at the defendant's request: in these and in many other cases the subsequent express promise to pay was held to afford a good ground of action. In Wilkinson *v.* Oliveira, 1 Scott 461, it was held that the plaintiff's having given a letter to the defendant, at his request, was a good consideration for a subsequent promise by the latter to pay the former 1000*l.* The same law is laid down with reference to a solicitor (who, anciently, could not sue without an express promise to pay), and a counsel. Thus, in Rolle's Abridgment, *Action sur Case* (Q), pl. 12, it is said,—"If A., in consideration that B. had solicited several suits for him, and had done divers businesses for him, assumes to convey to him his manor of D., or to give him as much as the manor is worth, this is a good consideration, though past, because it was done at his request: Henne *v.* Rolph, Mich. 10 Car., Leach *v.* Bronsal, Mich. 22 Car., per Cur. In consideration that before, at the request of the defendant, ille habuisset magnam curam de negotiis defendentis in lege, et preservasset defendentem à multis *periculis." In Marsh and Rainford's Case, 2 Leon 111, where judgment was given for 200*l.* promised to the plaintiff in consideration that he had married the defendant's daughter, Wrey, J., said: "Although the considera- [*686 [*687

tion be precedent, yet, if it were made at the instance of the other party, the action would have lain. If one cometh to a serjeant at law to have his counsel, and the serjeant doth advise him, and afterwards the client, in consideration of such counsel, promiseth to pay him 20*l.*, an action lieth for it." And so Popham, J., said it had been adjudged in the Exchequer. This case is cited as law in Comyns's Digest, *Action on the Case upon Assumpsit* (B. 12). Some misapprehension seems to have been created by the note to Wennall *v.* Adney, 3 B. & P. 247, and by the language of Lord Denman in Eastwood *v.* Kenyon, 11 Ad. & E. 438 (E. C. L. R. vol. 39), 3 P. & D. 276, and Roscorla *v.* Thomas, 3 Q. B. 234 (E. C. L. R. vol. 43), 2 Gale & D. 508. In Roscorla *v.* Thomas, it is said that "a consideration past and executed will support no other promise than such as would be implied by law;" which is true, if there had been no previous request, but not otherwise. And in Eastwood *v.* Kenyon, the Court adopt the conclusion in the note to Wennall *v.* Adney, "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation on which it is founded never could have been enforced at law;" which is true only to this extent, that a mere moral obligation will not support a subsequent promise, unless there has been a previous request. In Wennall *v.* Adney, a Master was held not liable on an implied promise to pay for medical attendance on his servant. In Eastwood *v.* Kenyon, it was held that
*688] the laying out of money to improve a woman's land, not *at her request, could not support a subsequent promise to pay: but Lampleigh *v.* Brathwait was expressly recognised as law. In Roscorla *v.* Thomas, the declaration stated, that, in consideration that the plaintiff, at the defendant's request, had bought a horse of the defendant at a certain price, the defendant promised that the horse was free from vice. This was held bad; and properly so, because the purchaser of the horse formed a complete contract at the time, and there was no new consideration on which to found a new promise. The implied promise to deliver the horse to the purchaser exhausted the consideration; as in Granger *v.* Collins, 6 M. & W. 458,† and other cases referred to in the notes to Lampleigh *v.* Brathwait, in 1 Smith's Leading Cases 135. But the last objection does not apply to a case where no promise is implied by law; as Tindal, C. J., points out clearly (though he speaks dubiously) in Kaye *v.* Dutton, 8 Scott N. R. 495, 7 M. & G. 807 (E. C. L. R. vol. 49). "Where," says that learned Judge, "the consideration is one from which a promise is by law implied, there no express promise in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. It *may* perhaps be different, where there is a consideration from which no promise would be implied by law, *i. e.* where the party suing has sustained a detriment to himself or conferred a benefit on the defendant, *at his request*, under circumstances which would not raise any implied promise." It *must* be different, if Lampleigh *v.* Brathwait is still law; for, the whole point of that case is, that the express subsequent promise, coupled with the previous request, gives a right of action, notwithstanding that the service

itself is not one from which the law would imply a promise of reward. It is the request coupled with the subsequent promise which puts a mere moral obligation on the footing of a legal obligation. *Without the previous request, the promise is nudum pactum. [*689
In Hayes *v.* Warren, 2 Stra. 933, 2 Kelynge 117, where an assumpsit for work and labour not said to have been done at request was held to be bad, the Court agreed, that, where there was an express request at the time when the past consideration was performed, it was in all cases sufficient to support a subsequent promise. The whole of the law upon this subject was under discussion in a late case in the Court of Exchequer in Ireland,—Bradford *v.* Roulston, 8 Irish Common Law Rep. 468,—where all the English authorities were reviewed, and the Court decided that the rule in Lampleigh *v.* Brathwait was universal. The case of Veitch *v.* Russell, 1 Car. & M. 362, 3 Q. B. 928, 937 (E. C. L. R. vol. 43), 3 Gale & D. 198, may be supposed to introduce an exception in the case of physicians, and consequently of barristers. The facts, however, do not warrant such a conclusion. The defendant had requested Dr. Veitch to attend her brother, and afterwards asked him to send in his account, which he did, demanding 150*l.* The defendant wrote to complain of his high charge, saying "60*l.* or 70*l.* is as much as I can afford. Will you let me know the name of your banker, that I may pay 70*l.* to your account?" Dr. Veitch took no notice of this offer, but brought his action. Had he assented to the offer of the 70*l.*, he might doubtless have maintained an action for it; according to Lampleigh *v.* Brathwait. But a mere proposal to pay a certain sum, without assent by the other party, does not make a promise within the rule; for, a promise upon which an action can be founded must form a part of an agreement; and every part of an agreement must have been assented to by both sides. The sum promised under the rule in Lampleigh *v.* Brathwait stands precisely on the same footing as a sum agreed to upon an account stated. Dr. Veitch, however, rejected the offer, *relying on his general [*690
rights. The jury having found that there was no express contract for recompense, his became the ordinary case of a physician attending for his honorarium. That both a physician's and a barrister's service fall within the rule in Lampleigh *v.* Brathwait, is clear from the case of Marsh and Rainsford, 2 Leon 111. It is equally so from the reason of the thing. It may be urged, that, if reliance be placed upon this rule of law, the declaration should have been special, as in Lampleigh *v.* Brathwait. But, though the plaintiff might, if he had thought fit, have declared specially, he still has a right to declare according to the legal effect of the contract upon which he sues. Formerly it was the universal practice to set out the facts specially in the declaration: it was not until towards the close of the seventeenth century that general indebitatus counts came into use. Anciently, an account stated was understood to be something altogether different from that which it means at the present day. It was at one time doubted whether an account could be stated with the creditor himself: Rolle's Abridgment, *Dett* (L), pl. 1. It was thought that there must be mutual accounts between the parties, or at least different dealings and various items, and it was held that it might be pleaded as an answer to a demand on a quantum meruit. It is now, however, settled that

an acknowledgment of a single debt, or a single item, makes an account stated, and that it operates as an admission of a debt to support a count founded on it, and is not pleadable, though available as evidence for the defendant to limit his liability on a quantum meruit: Knowles *v.* Michel, 13 East 249; Highmore *v.* Primrose, 5 M. & Selw. 65; May *v.* King, 1 Ld. Raym. 680; Roades *v.* Barnes, 1 Burr. 9. It was at one time also thought that an account stated had no further
*691] operation than the reducing of an uncertain *amount to a certain one, and that the sum admitted to be due, to make an account stated, must be one for which an action would lie,—Porter *v.* Cooper, 1 C. M. & R. 378, 394;† Vale *v.* Egles, Yelv. 70. This doctrine, however, has been modified by recent decisions, which establish that it is sufficient if the account stated be founded upon a demand in the nature of a debt, or a contract of imperfect obligation,—for example, an equitable or a moral claim; and that the debt may be one created at the very instant of acknowledgment, or even a fiction of law, or a presumption arising out of the account stated itself. The following instances will illustrate this. A trustee admitting that he has a sum of money in his hands ready to be paid to the cestui que trust, is liable on an account stated: Roper *v.* Holland, 3 Ad. & E. 99 (E. C. L. R. vol. 30), 4 Nev. & M. 668 (E. C. L. R. vol. 30). Before he made such admission, there was no debt upon which he could have been sued at law. He created the debt the very instant before he stated the account. Upon the admission might be founded either a count upon an account stated or a count for money had and received: Pardoe *v.* Price, 16 M. & W. 451, 458;† Edwards *v.* Lowndes, 1 Ellis & B. 81, 89 (E. C. L. R. vol. 72). The trustee, when he first received the money, did not receive it to the plaintiff's use: the subsequent admission, however, having relation to that time, makes it a receipt to the plaintiff's use. So, where an executor has admitted that he holds a legacy for the plaintiff,—Topham *v.* Morecraft, 8 Ellis & B. 972 (E. C. L. R. vol. 92): or where partners have agreed that a certain sum is due from the one to the other,—Moor *v.* Hill, Peake, Add. Cas. 10. In Cleave *v.* Moors, 3 Jurist N. S. 48, a purchaser of an estate at an auction signed the contract, and gave his I O U to the auctioneers for the deposit: the contract having gone off, by the purchaser's default, it was held that the auctioneers might recover the amount of the I O U upon a count
*692] on an account stated,—*Martin, B., saying: "If two persons agree to make a thing a debt, it is such between them, and the transaction acts as a sort of estoppel." In Graves *v.* Cook, 2 Jurist N. S. 475, the directors of a mine on the cost-book principle agreed to take each one hundred shares, and each gave his I O U to the secretary for 100*l.*: and this was held to be evidence of an account stated between the secretary and each director,—Martin, B., telling the jury that it depended on whether the parties had arranged amongst themselves that the secretary should be the owner of the money. Upon a motion for a new trial on the ground substantially that the secretary had nothing on which to found his title to sue, it was held that there was a good consideration, as the other directors had agreed to give I O Us as well as the defendant. There, it is to be observed, the original agreement was between the directors themselves. Had any one of them failed to give his I O U, he could not have been sued by the

secretary, whose legal claim was not created until the I O U was given. In Pinchon *v.* Chilcott, 3 C. & P. 236 (E. C. L. R. vol. 14), there was a verbal contract for the sale of growing turnips, upon which it was held that the plaintiff could not recover; and yet the defendant's admission, after some of the turnips were drawn, that he owed the plaintiff 3*l.* for them, was held to entitle the latter to a verdict upon the account stated. In Seago *v.* Deane, 4 Bingh. 459, 1 M. & P. 227, the defendant agreed verbally, in consideration of the plaintiff becoming his tenant at a certain rent, to give her 20*l.* to repair the house: the plaintiff became tenant under a lease in which the agreement was not stated, and did the repairs; after which the defendant, on her applying for payment of the 20*l.*, said, "I cannot pay you now, but will out of the next rent:" and it was held, that, although the plaintiff could not recover the 20*l.* on the special agreement, it not having been reduced *to writing, she might recover on the account stated. Best, [*693
C. J., there said: "There are many cases to show that a moral obligation, accompanied by a [subsequent] distinct promise, is binding." And Gaselee, J., said: "It is clear, that, though a party be not bound by a contract, yet, if he makes a promise after it has been performed, he is liable upon an account stated." In Cocking *v.* Ward, 1 C. B. 858 (E. C. L. R. vol. 50), the defendant promised the plaintiff, who was tenant of a farm, that, if he would surrender it and prevail upon the landlord to accept the defendant as tenant, he would give him 100*l.* The plaintiff did surrender the farm and did prevail upon the landlord to accept the defendant as tenant, and, after the defendant had taken possession of the farm, demanded the 100*l.*, upon which the defendant admitted his liability, but asked for time, saying he would pay it when he got the valuation of his own farm. In an action to recover the 100*l.*, the declaration contained a special count upon the agreement and a count upon an account stated; and it was held that he was not entitled to recover on the special count, the agreement not being in writing, but that he was entitled to recover upon the account stated. The judgment of the Court was delivered by Tindal, C. J., after time taken for deliberation. After noticing the objection that the admission of a debt will only enable the plaintiff to recover upon an account stated where the debt itself is capable of being recovered, the Court held, upon the authority of Knowles *v.* Michel, 13 East 249, Highmore *v.* Primrose, 5 M. &. Selw. 65, Pinchon *v.* Chilcott, 3 C. & P. 236 (E. C. L. R. vol. 14), and Seago *v.* Deane, 4 Bing. 459 (E. C. L. R. vol. 13), 1 M. & P. 227, that the plaintiff was entitled to succeed upon the account stated: and they added,—"We think it sustainable also on principle; for, after the debt has formed an item in an account stated between the debtor and his creditor, it *must be taken that the debtor has [*694
satisfied himself of the justice of the demand, that it is a debt which he is morally, if not legally, bound to pay, and which therefore forms a good consideration for a new promise. The principle may not, perhaps, be applicable to cases where it can be shown that the original debt is absolutely void from any illegal or immoral consideration; but it applies to cases where the only objection is that the original debt might not have been recoverable, from the deficiency of legal evidence to support it." The result of these authorities is,

that there is ample consideration to sustain the plaintiff's claim, and that he is entitled to recover upon the account stated. It may be said, that, under the rule in Lampleigh *v.* Brathwait, the whole of the subsequent express promise is to be coupled with the previous request, and that the legal effect of this would be to convert it into a promise ab initio to pay a specified sum. The answer to this, however, is, that this would be a more violent fiction than the necessity of the case requires, and in many cases would lead to an absurdity. For instance, in those cases where it would have been impossible for the defendant to have known beforehand what the value of the services would amount to; of which the present case affords an example. Take another: I ask a man to travel from York to London for me, and thence to send me certain information. He complies with my request. On his return, upon an estimate of the expenses he has incurred, and the value of the information to myself, I promise to pay him 100*l.* I should not have been able to make this estimate in the first instance, and therefore it would not only be contrary to the fact, but irrational and absurd, to suppose that I promised it to him in the first instance. But, to hold that, after my express promise, I *695] became liable on a count for work and *labour and for money paid, and also on an account stated, is rational enough: and this is the legal effect of the decision in Lampleigh *v.* Brathwait. Bosden *v.* Thinne, Yelv. 40, also affords an illustration, the legal effect of the facts there specially set out being, that the defendant contracted to indemnify the plaintiff, and afterwards stated an account defining his liability. Here, the case is strengthened by the previous promise of remuneration.

2. The plaintiff is entitled to maintain this action in respect of the defendant's contract to indemnify him for loss and damage sustained by him at her request, and for services rendered irrespectively of his character as counsel, for which she promised to remunerate him. The Court will not inquire into the adequacy of the consideration: Sturlyn *v.* Albany, Cro. Eliz. 67; March *v.* Culpepper, Cro. Car. 70; Fyner *v.* Jeffrys, Aleyn 21; Haigh *v.* Brooks, 10 Ad. & E. 309, 323 (E. C. L. R. vol. 37), 2 P. & D. 477, 4 P. & D. 288; Skeate *v.* Beale, 11 Ad. & E. 983 (E. C. L. R. vol. 39), 3 P. & D. 597. "A consideration of loss or inconvenience sustained by one party at the request of another, is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself:" per Lord Ellenborough, in Bunn *v.* Guy, 4 East 190, 194. And see Shadwell *v.* Shadwell, 9 C. B. N. S. 159 (E. C. L. R. vol. 99). If there be a good consideration, it will sustain the contract, though coupled with a bad one: King *v.* Sears, 2 C. M. & R. 48;† Thomas *v.* Thomas, 2 Gale & R. 226.

3. A counsel's remuneration for services is recoverable at law under an express contract. It will be urged on the part of the defendants that counsel's fees are of an honorary character, and not recoverable by action. Blackstone, in 3 Comm. 28, says, "It is established with us that a counsel can maintain no action for his fees, *696] which are given, not as locatio vel *conductio, but as quiddam honorarium, not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his repu-

tation, as is also laid down with regard to advocates in the Civil law." In support of this proposition, he refers to the Digest, to the preface to Sir John Davy's Reports, and to the case of Moor *v.* Row, 1 Rep. Chan. 38. The relation of patron and client in republican Rome is too well known to require comment. The client received a sort of paternal protection from his patron, who assisted him (if necessary) by pleading in the Forum, and by expounding the law. In return for this, the client was bound to perform sundry duties to his patron, somewhat in the nature of feudal services; for example, to contribute to pay his fines, or for his ransom, or the portioning of his daughter. Thus, though the patron received no direct reward for what he did for his clients, he was indirectly recompensed by the increase of his political influence. Afterwards there sprang up a class of persons who devoted themselves to legal studies, and who took fees for legal advice. This was forbidden by the Lex Cincia, passed B. C. 204, which forbade all payments for legal assistance. The Lex Cincia, having fallen into neglect, was revived by Augustus, A. U. C. 732. This was again evaded. The subject was then brought before the Emperor Claudius, who passed a law limiting the advocate's fee to 10,000 sesterces (about 80*l.*). By an order of Trajan, the fee was not to be paid until the work was done, as we learn from Pliny's Epistle V. 21,—"peractis negotiis permittebatur pecuniam duntaxat decem millium dare." The fee, at a later period called "honorarium," did not for certain technical reasons form the subject of what the Romans called "actio," but was recoverable by the extraordinaria cognitio before the magistrate or præses of the *province: Sandar's Institutes, p. 475. The following are the enactments in the Digest, Lib. L. Tit. 13, art. 10, "In honorariis advocatorum ita versari judex debet, ut pro modo litis, proque advocati facundiâ et fori consuetudine, et judicii in quo erat acturus, æstimationem adhibeat: dummodo licitum honorarium quantitas non egrediatur." 12. "Si cui cautum est honorarium, vel si quis de lite pactus est, videamus an petere possit. Et quidem de pactis ita est rescriptum: Litis causâ malo more pecuniam tibi promissam ipse quoque profiteris; sed hoc ita jus est, si suspensâ lite societatem futuri emolumenti cautio pollicetur. Si vero post causam actam cauta est honoraria summa, peti poterit usque ad probabilem quantitatem, etsi nomine palmarii cautum sit; sic tamen ut computetur id quod datum est cum eo quod debetur, neutrumque compositum licitam quantitatem excedat. Licita autem quantitas intelligitur pro singulis causis usque ad centum aureos." The canon law in like manner protects the rights of the advocate. The 131st canon enacts that "No judge shall admit any libel without the advice of an advocate. No proctor shall conclude any cause without the knowledge of the advocate retained and feed; which if any proctor shall do, or by any colour whatsoever defraud the advocate of his fee, he shall be suspended from all practice for six months, without hope of being restored before the said term be fully complete." The term "honorarium," as applicable to a counsel's fee, was for the first time introduced by Sir John Davys, in the preface to which Blackstone refers, in which it is said,—"Our learned men in the law do not grow to good estates by any illiberal means, but in a most ingenious and worthy manner. For, the fees or

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rewards which they receive are not of the nature of wages or pay, or that which we call salary or hire. That which is given is called
*698] honorarium, and not merces; it *is not certain, nor contracted for; for, no price or rate can be set upon counsel which is invaluable and inestimable, so as it is more or less according to circumstances, viz. the ability of the client, worthiness of the counsellor, the weightiness of the cause, and the custom of the country. It is a gift of such a nature, and given and taken up on such terms, as, albeit the able client may not neglect to give it without note of ingratitude, yet the counsellor may not demand it without doing injury to his reputation, according to that moral rule Multa honestè accipi possunt, quæ honestè peti non possunt." This is clearly an inaccurate representation of the law as it then stood. It had been the practice from the earliest times down to the period when Sir John Davys wrote his reports, for counsel personally to communicate with their clients, and to contract for fees, and frequently for periodical salaries: and such fees and salaries were recoverable by action. Personal communication was necessary; for there were no attorneys. A man could only appoint an attorney by special permission, which was commonly granted by a writ out of Chancery. It was not until after the statutes of Merton (20 H. 3, c. 10), Westminster (3 E. 1, c. 33), and Gloucester (6 E. 1, c. 1), that suitors were allowed to appear at pleasure by attorney. The counsellor was for many centuries the only person known as a "lawyer:" see 17 R. 2, c. 10; Hollingshed's Chronicles, I., p. 262, 304, II., p. 678; Hall's Chronicle 503; Fortescue, p. 196; Dugdale's Origines, c. 45. The serjeants and apprentices stood on the same footing in regard to the client, except that the serjeants were higher in rank, and had the monopoly of advocacy in the Common Pleas. Fabyan, in his Chronicles, p. 476, calls them "serjeants and prentices of the law." The apprentices frequently acted as attorneys as well
*699] *as counsel after the ordinance of 20 E. 1, "De attornatis et apprenticiis." This commanded the Common Pleas to appoint a certain number of every county "de melioribus et legalioribus et libentius addiscentibus, quod curiam sequantur, et se de negotiis in eâdem curiâ intromittant." Some time after the ordinance of E. 1, the apprentices appeared both as attorneys and advocates in those Courts which the serjeants did not attend. These functions afterwards became separated: see Ryley's Pleadings in Parliament, p. 104; Manning's Serviens ad Legem, pp. 188, 268; 15 Q. B. 225 (E. C. L. R. vol. 69); Crabb's History of English Law, p. 182. The separation took place gradually as attorneys increased in number and importance. By the 4 H. 4, c. 18, it was enacted that attorneys should be examined by the justices, and their names put on a roll. The clients in that statute are called their masters. From this may be dated the establishment of attorneys as a regular body of practitioners. The increase in their numbers led to complaints at divers periods, and some statutes were passed limiting their numbers: see Rot. Parl. 504, 642, 666; 33 H. 6, c. 7; Hollingshed's Chronicles, Vol. I., p. 262; 2 Inst. 250. The attorneys became further separated from the bar by the rules made to exclude them from the Inns of Court in the 3 & 4 Ph. & M., and 16 Eliz., and lastly by that of Lincoln's Inn in 1635, that, "if any one after his admission became an attorney or common

solicitor, his admission should be void:" see Foss's Judges, V. 351, 426, 435, VI. 244; Dugdale's Origines 312; Reeve's History of English Law, V. 246. These rules completed the separation of the two branches of the profession, by severing their connection as students; and thenceforth attorneys were confined to the Inns of Chancery. During all this time no attempt had been made to interfere with the communication between counsel and *client, or with the right of counsel to make his own bargain with the client as to the terms of employment. Statutes had been passed against maintenance and champerty; and frauds were made punishable by the statute of Westminster 1, c. 29, which enacted, that, "if any serjeant, pleader, or other, do any deceit or collusion in the King's Court, he shall be imprisoned a year and a day." But there was neither law nor statute any further controlling the dealings between counsel and client, nothing regulating the mode or time of paying fees or their amount. It is not true, as Sir John Davys asserts, that counsel's fees were not in the nature of wages, salary, or hire. On the contrary, the terms "wages" and "salary" were commonly applied to them. The word "fee" of itself, signifies a stipend or sum of money which a man may claim as his right. Such are the fees payable to officers of courts, constables, stewards of manors, and the like: see 27 E. 3, c. 29; 5 Ric. 2, c. 16; 10 H. 6, st. 2. Lord Coke frequently uses the term "fee" as synonymous with "wages:" for example, in speaking of counsel's fees (2 Inst. 564, antè, p. 684), and of the stipends of members of Parliament (4 Inst. 46), which were payable of right: see 23 H. 6, c. 11, 35 H. 8, c. 11. They are called "wages" in an indenture made in 1463, between the member for Dunwich and the burgesses, in which he agrees to take "for his wages" a certain quantity of red herrings, to be delivered at Christmas: see Cuthbert Johnson's Life of Coke, Vol. I., p. 79. In the same work, Vol. II., p. 147, there is an account of the disbursements of James the First, taken from a paper in the Plumian Library, in which the term "fee" is applied to the annual salary paid to the Chancellor of the Exchequer, the secretary of state, Clarencieux King-at-Arms, the King's apothecary, the keeper of the garden for silk-worms, the master of the *harriers, the master falconer, the lord Admiral, and the lieutenant of the ordnance. In the Mirror of Justice, written in the reign of Edward II., we read the following concerning the serjeants, c. 2, s. 5,—"Le salary, entour quoi quatre choses sont a regarder, 1. le quantity de la cause, 2. la travaile de serjeant, 3. la value del counter, come son savoir, facunde, et dones, 4. l'usage del court." There is nothing in the Mirror intimating that there was any law to control the serjeant in his bargain with his client. The passage is admonitory, for the guidance of the serjeant. The word "salary" shows the character of the payment. In the oath of the King's serjeant, set forth in 2 Inst. 214, the fourth clause is,—"He shall take no *wages* nor *fee* of any man for matter where the King is party against the King." In Brownlow's Entries (published in 1654), p. 172, there is a precedent of a declaration in debt by a counsel stating "that the defendant had retained him to be his counsel in any action in which he should sue or be sued, capiendo pro salario 6*s*. 8*d*. a year," claiming five years' arrears, with a count for 6*s*. 8*d*. for money lent.

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In Rastell's Entries, *Dette*, pl. 3, p. 194, there is a declaration on a judgment setting out a count upon a retainer of the plaintiff to be counsel "in omnibus causis et materiis legem terræ tangentibus, quoties idem A. ad consilium suum inde sibi dandum requiere vellet," for two years certain, for 13*s.* 4*d.* for each year, to be paid in equal portions at the feast days, claiming arrears for the two years, and alleging that he was always ready, &c. Again, p. 203, b, for precedents of declarations in "det sur reteiner destre de counsel," the author refers us to those by attorneys. Pl. 6 recites that the defendant retained the plaintiff as attorney "capiendo singulis annis pro feodo suo 6*s.* 8*d.*, et ultra feodum illud rationabiles misas et expensas
*702] circa prosecutionem negotiorum *appositas." A similar precedent is found in pl. 7. In pl. 8 is the following,—"Quod retinuisset ipsum R. essendi de consilio ipsius B., et ad prosequenda et defendenda pro eodem B. ut ejus attornato omnia placita, &c., per septem annos, capiendo inde annuatim 13*s.* 4*d.*, ultrà misas," &c. Again, pl. 9,—"Quod retinuisset ad deserviendum ei in officio attornati, &c., capiendo pro salario suo quolibet anno 6*s.* 8*d.*" In the same book, p. 429, title *Maintenance*, pl. 10, there is a plea to an action of maintenance stating that the defendant was the cousin of the said R., who asked him to request a certain person learned in the law to be his counsel in the said cause, promising "quod idem R. ipsum bene et sufficienter pro labore suo remuneraret," and thereupon the defendant had gone to one G. L., learned in the law, and asked him to be counsel of the said R. in the said cause, and told the said G. L. that the said R. "ipsum bene et sufficienter pro labore suo remuneraret;" which is the said maintenance, &. Pl. 11 is to the same effect, stating that the defendant went to a counsel at an assize, and retained him for his cousin, and gave him 6*s.* 8*d.* for his retainer. Pl. 18 is a plea by counsel to an action of maintenance, stating that he was retained for the parties, "capiendo pro consilio suo prout ad tunc et ibidem inter eos concordatum erat, virtute cujus rententionis fuit de consilio prædictorum tam in materiâ in quærelâ prædictâ contentâ quam in aliis materiis eorum legalibus, et eos secundum intelligentiam scientiæ consulnuit, et cum aliis personis de consilio eorum communicavit, ac eos essendi de consilio suo requisivit et laboravit, prout ei bene licuit." In the Year Book, 34 H. 6, fo. 25, pl. 3 (cited in Manning's Serviens ad Legem, p. 272), the defendant in a charge of maintenance for retaining counsel for his servant, alleges that he engaged him for a
*703] *salary* of 20*s.*, and gave him 3*s.* 4*d.* for *retaining fee. Foss, in his Judges of England, vol. V., p. 21, says: "Where counsel were retained to go to the assizes, the process of a deed was adopted:" and he sets forth such a deed in the 16th year of Henry 7, in which Serjeant Yaxley was retained by Sir Robert Plompton. The serjeant engages to be at the next assizes at York, Nottingham, and Derby, and to be counsel for Sir Robert, "for which promises, as well as for his costs and labour, John Pulan, gent., bindeth him by these presents to pay to the said John Yaxley 40 marks sterling at the feast of the Nativity of our Lady, or within eight days next following, with 5*l.* paid beforehand." There is a proviso for an abatement, should he have notice not to go to York; and that, if he had notice not to go at all, he shall keep the 5*l.*; and, further, that Sir

Robert shall pay the serjeant's travelling expenses. Foss says "this was a large and special fee." He tells us that, about the same period, "three counsel received 3*s.* 4*d.* each from the Mayor and Aldermen of Canterbury for advice; and the same body paid the Recorder of London a retainer of 6*s.* 8*d.* A fee paid by the Goldsmiths' Company to Serjeant Wood was 10*s.*" There seems to be no doubt that an action lay against a counsel who failed to perform an engagement to his client. In the Year Book, H. 11 H. 6, fo. 18, pl. 10, T. 11 H. 6, fo. 55, pl. 26 (cited in Manning's Serviens ad Legem, 183), it was held, that, if counsel was retained to buy a manor, and afterwards became counsel for another and bought it for him, an action would lie, though not if he had used his best endeavour. In 14 H. 6, fo. 18, pl. 58, Paston, C. J., says,—"If you, being serjeant-at-law, undertake to plead my plea, and do not, or do it in another manner than I told you, whereby I have loss, I shall have my action on the case." In 20 H. 6, fo. 34, pl. 4, Stokes (counsel) put this case: "Suppose I *retain one who is learned in the law to be of counsel with me at Guildhall at a certain day, at which day he does not come, whereby my matter is lost, now he is chargeable to me in an action of deceit." [*704 And this is cited as law in Rolle's Abridgment, vol. I., p. 91, pl. 11. In Rastell's Entries, p. 2, there is a precedent of a count against an attorney or counsel for not appearing in Court according to his retainer. Numerous instances of annual retainers and fees paid to counsel are to be found in Foss's Judges, vol. IV., 351, vol. V., 109, 425, vol. VI., 236; Hall's Chronicle 359; Cavendish's Life, Singer's edit. 100; Bramston's Autobiography, published by the Camden Society, pp. 5, 6, 30, 31; Selden's Table Talk (Singer's edit.), Contracts, 3. In Comyns's Digest, *Dett* (A. 8), it is said: "If a man retains counsel for 40*s.* per annum, debt lies,"—citing the Year Book, 37 H. 6, fo. 8 b, and Rol. Abr. 593, l. 45. In Rolle's Abridgment, *Condition* (B.), pl. 10, it is said: "If the grantee of an annuity pro consilio impenso et impendendo refuse to give counsel, it determines not the annuity, because it was given as well for services past as to come." "On a feoffment of land pro consilio impenso et impendendo, if the feoffee deny counsel, yet the feoffor cannot reenter, for the sale of the land is executed:" per cur. in Locke *v.* Wright, 8 Mod. 42. There is a case in the Year Book, 39 H. 6, fo. 21, pl. 31 (cited in Manning's Serviens ad Legem 269), where the declaration is in debt for 40*l.* arrears of an annuity against the Abbot of Chester. It is founded on a deed by the late Abbot, granting a rent-charge out of the convent lands pro consilio impenso et in posterum impendendo; to which there is a plea, as to part, that the plaintiff had refused to give counsel to the late Abbot, and, as to the previous arrears, that he did not give counsel. The Court thought the plaintiff was bound to say in his count that *he had given counsel, the action being against the successor. Issue was joined, and the case sent to be tried in the county palatine. [*705 If, however, an annuity was granted only pro consilio impendendo, it would be a defence to an action by the grantee that he had denied counsel. In Plowden, p. 32 a, it is said by Hinde, J., that, "if one grants to another an annuity pro consilio impendendo, the grantee shall have a writ of annuity, without showing that he has

given him counsel; for, the showing thereof is not for his benefit, and the denial of counsel goes in defeasance of the annuity, which ought to be shown by the defendant." Again, p. 160, per Staunford, J.,—"If an annuity is granted pro consilio impendendo, and the grantee has divers faculties, yet the counsel shall be given in such faculty as was intended." Mingay *v.* Hammond, Cro. Jac. 482, was an action on an annuity pro consilio impendendo, by a bencher of the Inner Temple, demanding 6*l.* arrears for three years: plea, that the defendant had divers injuries, for which he intended to exhibit a bill in the Star Chamber, and he brought a bill to Mingay to put his hand to, and he refused: and the plea was held ill on demurrer, because a counsellor who hath such a fee is not bound to put his hand to every bill, but only to give counsel. These authorities sufficiently show that Sir John Davys was mistaken in his representation as to the English law with regard to counsel's fees. As to the right of attorneys and solicitors to recover remuneration for services in soliciting causes, see Worthington *v.* Garstone, Hob. 67; Germyn *v.* Rolls, Cro. Eliz. 425; Rolls *v.* Germine, Cro. Eliz. 459; Thursby *v.* Warren, Cro. Car. 159; Comyns's Digest, *Action upon the Case upon Assumpsit* (B. 5). It must be borne in mind, that, in earlier times, as a general rule, there were no implied contracts to pay for services; and it was the common
*706] *practice to stipulate for a certain amount: contracts on a quantum meruit did not come into vogue until the seventeenth century. This appears not only from the entries in Rastell already cited, of declarations by counsel and attorneys, but from those by servants, nurses, priests, and others, which are all for specified sums. There was no distinction in this last respect between counsel and other persons. There was no law to prevent a counsel from making an express contract with an attorney, any more than there was for an attorney to be retained by a third person on an express promise: Ambrose *v.* Roe, Skinner 217; Woodhouse *v.* Bradford, 2 Roll. R. 76. Some light is thrown upon the dealings between counsel and attorneys by the statute 3 Jac. 1, c. 7. That statute, after reciting, that "through the abuse of sundry attorneys and solicitors in charging excessive fees, the subjects were overmuch burdened, and the practice of the just and honest serjeant and counsellor-at-law greatly slandered," &c., enacts (s. 1), that "no attorney, solicitor, or servant to any, shall be allowed from his client or master any fee given to any serjeant or counsellor-at-law, or any sum given to clerks or officers, unless he have a ticket subscribed with the hand and name of the same serjeant or counsellor, clerks or officers, testifying how much he hath received for his fee, &c., and that attorneys and solicitors shall give true bills to their masters or clients," &c. Upon this statute there were numerous decisions, which tended to make it of little effect. In Evely *v.* Livermore, Aleyn 4, and Berkenhead *v.* Fanshaw, 1 Salk. 86, it was held to be no plea to a special promise or to an insimul computassit. In Moor *v.* Row, 1 Rep. Ch. 38 (referred to in 3 Bl. Com. 38), the plaintiff, being a counsellor, brought his bill for fees due to him from the defendant, being a solicitor, who was to account with him at the end of every term. The defendant demurred; the
*707] *Court allowed the demurrer nisi causa. Demurrer affirmed. In the original roll it appears that the bill stated that the plaintiff

tiff was retained by four clients to conduct proceedings in divers Courts. He was afterwards introduced to the defendant, and an arrangement was made with him that he should pay to the plaintiff at the end of each term such sums as he received for him from the clients. The bill was to obtain an account of these sums. The demurrer is on several grounds,—1. that the clients were not made parties,—2. that the bill did not set forth the proceedings in which the plaintiff had been engaged,—3. that there was no precedent for such a bill. The ground of the decision is unknown. The defendant was a mere servant of the clients, introduced after the retainer. If he was liable at all to the plaintiff, it would have been in an action for money had and received, supposing him to have received money for the express purpose of paying it over. There was no such privity between them as to make him liable to a bill for an account: and, to maintain the bill, it was necessary that there should have been mutual accounts between the parties, except in the case of a steward, or of dower: Bacon's Abridgment, *Accompt* (A.); 1 Madd. Ch. Prac., 3d edit. 118, 121. Nothing is said about "honorarium" in the demurrer: but, on the contrary, the interest of the clients in the matter is made one of the grounds of demurring. The case, however, serves to show the unsettled state of the practice at that period: and there are many authorities to show that the present course of dealing between counsel and attorney was of slow and comparatively modern introduction: see Winwood's Memorials, Vol. III., p. 460; North's Life, 59, 71; Bawdes *v.* Amherst, Pre. Chan. 402. The Statute of Treasons, 7 W. 3, c. 3, enacts that the accused party shall have a copy of the indictment five days before the trial, "to enable him *to advise with counsel," and that the Court shall at his request assign him [*708 counsel, not exceeding two, and such counsel shall have free access to him at all seasonable times. In Style's Pr. Reg. 4th edit. p. 24, it is said,—"If an attorney, solicitor, or *counsellor* get writings into his hand upon account of any suit, and refuse to redeliver them, there being no fees due to him, the Court upon motion will compel redelivery, without forcing the party to action for such his writings. But, if there be fees due to him, the Court will not force the delivery until the fees, to be taxed by the master of the office, be paid." Conveyancing, indeed, was until a late period exclusively in the hands of counsel: and the most eminent men of the bar used to draw deeds and wills for their clients, without other professional intervention. In 1540, Sir Nicholas Hare, Speaker of the House of Commons, Sir Humphrey Brown, King's serjeant, and another counsel, were committed by the Star Chamber for making a will for Sir John Shelton, to defeat the King's feudal rights: see Hall's Chronicle 837; Oldmixon, III. 118; 32 H. 8, c. 36. It was held to be slanderous to say of a barrister that he could not make a lease; whereas, it was not slanderous to say of an attorney that he made false writings, because it was not his business to make writings: 1 Rol. Abr. 54; Bacon's Abridgment, *Slander* (B. 3). The general literature of the period contains numerous passages which show that the dealings between counsel and client, both as regards instructions and payment, continued to be direct, and the payment of fees a matter of personal bargain, till shortly before the beginning of the seventeenth century, at which time attorneys and soli-

citors began to be the medium of communication and the paymasters. The establishment of the present practice was owing in some measure to the statute 2 G. 2, c. 23. The prepayment of the fee, first
*709] *insisted on by counsel as a measure of convenience and protection, led to the notion of its being a gratuity, and to the introduction of the term "honorarium." The first time, probably, that the doctrine of the honorarium found its way into a legal report was in the case of Thornhill v. Evans, 2 Atk. 330. The defendant, a barrister, having a mortgage from the plaintiff, had at the end of every six months turned the interest into principal at 5 per cent., the mortgage being only at 4½; and, when it was paid off, he insisted on an advance of six months' interest, on the pretence that the plaintiff had agreed to pay double interest for the last six months, by way of gratuity for services previously done. Lord Hardwicke said,—"Can it be thought that this Court will suffer a barrister to maintain an action for fees, which is quiddam honorarium; or, if he happens to be a mortgagee, to insist on more than legal interest, under pretence of gratuity or fees for business formerly done as counsel? To admit such a clandestine way of coming at fees is worse than the other." No objection can be made to that decision: there was no previous contract for payment of services. In Turner v. Philipps, Peake, N. P. C. 166, an action having been brought to recover back a fee, for the non-attendance of counsel, Lord Kenyon recommended the parties to settle, on the ground that the fee was a gratuity: and his advice was adopted. In Re May, 4 Jurist N. S. 1169, Kinderley, V. C., dismissed a petition of a barrister to enforce payment of fees which had been included in a solicitor's bill, and taxed and ordered to be paid: and in Hobart v. Butler, 9 Irish Common Law Rep. 157, it was held by Pigot, C. B., that a solicitor had no implied authority to bind his client by an undertaking to a barrister that the client will pay him if he receipt
*710] fees then due, for the purpose of taxation; and *that the subsequent receipt by the client of taxed costs (which included those fees) will not, without more, make him liable to the barrister for money had and received. Upon these authorities, it must be conceded, that, where a barrister receives a brief from an attorney, whether endorsed with a fee or not, this creates no contract between him and the attorney, or between him and the client, to pay him for his services: the endorsement of the fee creates only a moral obligation, which will confer no right of action, unless followed by an express promise,—as in Lampleigh v. Brathwait. But there is no law or statute to preclude them from entering into express contracts. That counsel may receive direct retainer and instructions from the client in civil as well as in criminal cases, was decided in Doe d. Bennett v. Hale, 15 Q. B. 171 (E. C. L. R. vol. 69). If so, why may they not contract for payment? In Egan v. The Guardians of the Kensington Union, 3 Q. B. 935 n. (E. C. L. R. vol. 43), it was held that a barrister who had acted as returning officer at an election of guardians under a contract to be paid so much per day, might sue for the amount. In Virany v. Warne, 4 Esp. N. P. C. 46, it was ruled by Lord Kenyon that an arbitrator was not entitled to recover his fees, except under an express contract: and in accordance with that opinion was decided Hoggins v. Gordon, 3 Q. B. 466 (E. C. L. R. vol. 43), where the defend

ants promised, that, if the plaintiffs would undertake a reference, they would pay them their reasonable costs as they should by their award appoint, and the plaintiffs, having awarded a certain reasonable sum to be paid to themselves, were held entitled to recover. In Marsack *v.* Webber, 6 Hurlst. & N. 1, 5,† it was said by Martin, B., that, "if parties placed before an arbitrator an agreement of reference stating that the expenses were to abide the event, it was an express representation to the arbitrator that he should be paid." And Channell, B., concurred. In Re Hall, 2 Jurist N. S. 1076, it *was held that [*711 a barrister might prove against a solicitor's estate in bankruptcy for fees to the amount received by him. The Barons of the Irish Exchequer who decided Hobart *v.* Butler admitted that counsel's fees were recoverable where there is an express contract. And Pollock, C. B., in Swinfen *v.* Lord Chelmsford, 5 Hurlst. & N. 919, 921,† recognises the power to make express contracts. "If," he says, "a party desire to retain the power of directing counsel how the suit should be conducted, he must agree with some counsel willing to bind himself." "Upon an express contract, he would be liable as any other person party to a contract." The relations of physician and patient appear to have undergone similar changes, and to have been subject to the same kind of law as those between counsel and client. Anciently, physicians made express contracts for remuneration. In the eighteenth century arose the doctrine of gratuitous fees, accompanied with contemporaneous payment: and the custom has been held to be controlled by express contract: see Comyns's Digest, *Dett* (A. 8), referring to Rol. Abr. and the Year Books; Manary *v.* Strange, 2 Rol. R. 411; Shepherd *v.* Edwards, Cro. Jac. 370; Marsh *v.* Rainsford, 2 Leon. 111; Bourne *v.* Mason, 1 Ventr. 6; The College of Physicians *v.* Butler, Littleton R. 246, 250; Chorley *v.* Bolcot, 4 T. R. 317; Lipscome *v.* Holmes, 2 Campb. 441; Veitch *v.* Russell, 1 Car. & M. 362, 3 Gale & D. 198, 3 Q. B. 937 (E. C. L. R. vol. 43); Battersby *v.* Lawrence, 1 Car. & M. 277; Little *v.* Oldacre, 1 Car. & M. 370;† The Attorney-General *v.* The College of Physicians, 1 Johnson & H. 561. In the last-cited case, Wood, V. C., said that it was by reason of the custom only that it had been held that physicians could not maintain actions for services; but that they might if there was a special contract. The analogy between the two cases (of counsel and physician) is perfect in this respect. *It may be objected, that, [*712 though there may be an express contract to pay a certain sum, there cannot to pay an undefined amount. It is difficult to conceive upon what such a doctrine could be founded: it is in many cases impossible to ascertain beforehand what will be a reasonable compensation for services. If it be urged that there is no precedent of an action by a counsel on a quantum meruit, the obvious answer is, that contracts of this kind for any services were unknown until towards the end of the seventeenth century, about which time the relations between counsel and their clients underwent the change already pointed out. In Lilly's Practical Register, title *Fees*,—a book published in 1719,—is the following: "Debt or case lies for an attorney for his fees against him that retained him in his cause. Quære, whether it lies for a counsellor, without special retainer." The following cases sufficiently indicate the time when contracts on a quantum meruit came to be

established. Rogers *v.* Head, Cro. Jac. 262, was an action by a carrier (not a common carrier) to recover "as much as was reasonable;" it was objected that the consideration was void for uncertainty; but the objection was overruled. In Shepherd *v.* Edwards, Cro. Jac. 370, the declaration stated, that, the plaintiff being a professor of physic and surgery, the defendant, in consideration that he would apply wholesome medicines to cure him of a fistula, and give him his labour and counsel, promised to pay him such sum as the plaintiff deserved; and the plaintiff cured him, and averred that he deserved 100*l.*; it was objected that the quantum meruit was uncertain; but the plaintiff had judgment. The like objection was made in Hall *v.* Walland, Cro. Jac. 618, which was an action for procuring a person to license a lessee to assign his lease. Shepherd *v.* Edwards was cited; and the Court said that the quantum meruit was certain enough, for, *713] *the jury might abridge the demand, at their discretion. And see Lee *v.* Edwards, 1 Leev. 280, 1 Mod. 14, 1 Ventr. 44, 1 Sid. 428, 2 Keble, 559, 566; Manary *v.* Strange, 2 Roll. R. 411; Rolte *v.* Sharp, Cro. Car. 77; Jermy *v.* Jenny, Sir T. Raym. 8. In Mason *v.* Beldham, 3 Mod. 73, it was held that assumpsit would lie on an express promise to pay so much rent as a house was reasonably worth. In Osborn *v.* Rogers, 1 Saund. 264, the declaration stated that A. B. requested the plaintiff to go into his service, and promised that he would look on him as a son, and amply provide for him, and that the plaintiff went into his service, and served him without salary, and A. B. gave him only 20*l.* for compensation, which was not sufficient, wherefore the plaintiff said he had damage to the value of 1000*l.*: and no objection was made to this declaration. In Anonymous, 11 Mod. 306, assumpsit for the hire of a horse per magnum tempus, on a quantum meruit, was held to be good: and in Anonymous, 12 Mod. 509, where A. promised B. 10*l.* if he would procure one to give him an annuity of 100*l.* for 900*l.*, and B. procured one to give it for 1000*l.*, and A. agreed for the annuity,—it was held that B. might sue on a quantum meruit. In Ballard *v.* Gerrard, 12 Mod. 609, a prohibition was awarded to the Spiritual Court, where the registrar had libelled for his fees: and Holt, C. J., said: "No Court has the power of settling the fees of its officers; but thus far they may go, as, to judge what are reasonable fees, and in a quantum meruit by the officer for such fees, the Judge's assessing may be good but not conclusive evidence to a jury."(*a*) In Stockton *v.* Collison, Comb. 186 (reported as Stockhold *v.* Collington, 1 Show. 342), the plaintiff averred that he had served at the defendant's request as a Commissioner on a com- *714] mission out of the Exchequer to *examine witnesses, and the defendant, in consideration thereof, promised to pay him so much as he deserved for his labour, and he deserved 5*l.*: and it was held that he was entitled to recover. Should it be suggested that there are practical difficulties in estimating the value of counsel's services, and that such a task is more fit for a taxing officer than for a jury, the answer is, that the law has provided no machinery for taxing counsel's fees, except where they form part of an attorney's bill. A jury can as easily estimate the value of counsel's services as they can those of a physician. That the services of a physician are

(*a*) See Shephard *v.* Payne, 12 C. B. N. S. 614 (E. C. L. R. vol. 104).

estimable by a jury, was expressly decided in Shepherd *v.* Edwards, Cro. Jac. 370: and that he may maintain a quantum meruit upon a special contract, was ruled by Wightman, J., in Veitch *v.* Russell, 1 Car. & M. 362.† "It is a novel doctrine to me," said that learned Judge, "that a physician cannot contract for compensation. All the cases decide, is, that a contract cannot be implied from the mere fact of a physician's attendance." And this view seems to have received the assent of the full Court. The difficulty of estimating damages or compensation is no ground for withdrawing the matter from the cognisance of a jury. If the elements of calculation are not clearly pointed out by the terms of a contract, they are to be gathered from the surrounding circumstances. In Jewry *v.* Busk, 5 Taunt. 302 (E. C. L. R. vol. 1), where the plaintiff had been requested to show the defendant's house, the defendant promising to make him a handsome present, it was held to be a contract to pay a reasonable compensation, to be ascertained by a jury. So, in Farnsworth *v.* Garrard, 1 Campb. 38, which was a quantum meruit for building a house, Lord Ellenborough told the jury that "the plaintiff was to recover what he deserved." Again, in Brown *v.* Nairne, 9 C. & P. 204 (E. C. L. R. vol. 38), where the question was as *to a broker's commission, Alderson, B., said: "If you think there is no practice on the [*715 subject, you will find what is the amount you think a reasonable remuneration." See also Hamond *v.* Holiday, 1 Car. & P. 384 (E. C. L. R. vol. 12), Pepper *v.* Burland, Peake N. P. C. 139, Robson *v.* Godfrey, 1 Stark. N. P. C. 275 (E. C. L. R. vol. 2), Gilbert *v.* Berkinshaw, Lofft 771, Feize *v.* Thompson, 1 Taunt. 121, and Day *v.* Holloway, 1 Jurist 794. It is said to be contrary to the general policy of the law for counsel to bargain for future payments for their services: and there are, no doubt, extrajudicial opinions of very eminent Judges to that effect. In Morris *v.* Hunt, 1 Chitt. R. 544 (E. C. L. R. vol. 18), Bayley, J., says,—"Counsel can bring no action for fees, because it is understood that their emoluments are not to depend upon the event of the cause. They are to be paid beforehand, because they are not to be left to the chance whether they shall ultimately get their fees or not. It is their duty to take care that they have them beforehand; and the law allows no remedy if they disregard their duty. It is of advantage to the public that they should receive these emoluments, which produce integrity and independence." And Best, J., says,—"Counsel should be rendered independent of the event of the cause, that no temptation may induce them to endeavour to get a verdict which in their consciences they think they are not entitled to. Counsel should be as independent as the Judge or jury." These dicta, it is submitted, rest on no solid foundation. Although the Barons of the Irish Exchequer, in Hobart *v.* Butler, 9 Irish Common Law Rep. 157, express their concurrence in this opinion, they nevertheless declare that counsel's fees are recoverable on a special contract.

The learned counsel concluded with some general remarks upon the circumstances under which he undertook the advocacy of Mrs. Swinfen's cause, and *urged that the case, being of an extra- [*716 ordinary and exceptional character, was not to be judged of by the ordinary rules.

Macaulay, Q. C., and *Field*, in support of the rule.—There was no

evidence to support the count upon an account stated, there being no accounting with the plaintiff, no accounting in respect of moneys due and in arrear for services rendered, and no binding promise to pay, and the whole consideration being based upon a supposed contract which is contrary to the policy of the law. The expressions imputed to the defendant must be looked at as the mere outpourings of a grateful client, and not as intended to create a binding contract,—as were the expressions in Veitch *v.* Russell, 3 Q. B. 928 (E. C. L. R. vol. 43), 8 Gale & D. 198. Notwithstanding the case of Seago *v.* Deane, 4 Bingh. 459 (E. C. L. R. vol. 13), 1 M. & P. 227, the law is clear: the consideration for the promise is the statement of the account; but the issue is, that the defendant was indebted, and thereupon the parties stated an account: there must be a previous indebtedness: Trueman *v.* Hurst, 1 T. R. 42. [WILLIAMS, J.—You will, no doubt, deal with the case of Cocking *v.* Ward, 1 C. B. 858 (E. C. L. R. vol. 50).] What the Court say at the end of the judgment there so qualifies the case as to make it cease to be an authority. There was a debt, but one which could not be enforced for want of evidence which a statute made requisite. There, a count in assumpsit stated that A. was the occupier of a farm as tenant to one V.; that B., the defendant, was desirous of renting the farm from V., and had applied to and requested A. to surrender and relinquish possession thereof to V. and to endeavour to prevail upon V. to accept of such surrender, and to accept B. as tenant in lieu of A.; and that, in consideration that A. would surrender and relinquish *possession of the farm to V., and would also apply to V. and endeavour to prevail upon him to accept of such surrender and to accept B. as tenant in lieu of the plaintiff, B. promised to pay A. 100*l.* when he should become such tenant. It then averred that A. did surrender and relinquish, &c., and did apply to and endeavour to prevail upon V. to accept of such surrender and to accept B. as tenant in lieu of A.; and that V. accepted the surrender, and accepted B. as tenant; but that B. refused to pay the 100*l.* It was held, that, this being a contract for an interest in or concerning lands, the special count could only be proved by a note or memorandum in writing, in conformity with the 4th section of the Statute of Frauds; but that A. might recover the 100*l.* upon a count upon an account stated, upon proof that B. had, since he obtained possession of the farm, acknowledged his liability, and promised to pay that sum. In delivering the considered judgment of the Court, Tindal, C. J., says: "After the debt has formed an item in an account stated between the debtor and his creditor, it must be taken that the debtor has satisfied himself of the justice of the demand, that it is a debt which he is morally, if not legally, bound to pay, and which therefore forms a good consideration for a new promise: and the creditor, on the other hand, may reasonably be excused for not preserving the evidence which would have been necessary to prove the original debt before such admission. The principle may not, perhaps, be applicable to cases where it can be shown *the original debt is absolutely void from any illegal or immoral consideration*, or where it is made void by any statute, as, by those against usury and gaming: but we think it applies to cases where the only objection is, that the original debt might not have been recovera

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ble, from the deficiency of legal evidence to support it." [ERLE, C. J.—*That is the operative part of that judgment. The original debt was one which was incapable of being enforced, but which might come into legal vitality by part payment or by a subsequent acknowledgment.] It was a valid contract, but the provision in the statute precluded the maintenance of an action upon it unless certain requirements had been complied with: Knowles *v.* Michel, 13 East 249, and Highmore *v.* Primrose, 5 M. & Selw. 65, were cited for the purpose of showing that the pre-existence of a debt was not necessary to sustain an account stated. Those cases, however, do not by any means support that contention: in both there was a previous legal liability. Roper *v.* Holland, 3 Ad. & E. 99 (E. C. L. R. vol. 30), 4 N. & M. 668, is open to the same answer: having admitted that he had 10*l.* in his hands, and appropriated it to the plaintiff's use, it was not competent to the defendant to shelter himself under his character of trustee. In Lemere *v.* Elliot, 6 Hurlst. & N. 656,† where the defendant verbally agreed to purchase of the plaintiff the lease and good-will of his premises, and on being asked for a deposit, gave an I O U for 25*l.*, but afterwards refused to complete the purchase,—it was held that the I O U was not evidence of an account stated. Channell, B., in the course of the argument, there says,—"An 'account stated' means an account stated of a debt *due* from the defendant to the plaintiff. Here, the I O U was merely given as a security for a deposit." And Martin, B., said,—"There was no account stated, because there was no debt due from the defendant to the plaintiff." "The old form of a count on an account stated was this,—'And whereas the said C. D. afterwards, to wit, on, &c., accounted with the said A. B. of and concerning divers sums of money from the said C. D. to the said A. B. *before that time due and owing, and then in arrear and unpaid;* *and, upon that accounting the said C. D. was then and there found to be in arrear and indebted to the said A. B. in the sum of 20*l.*" &c. And Wilde, B., refers to the language of Parke, B., in Porter *v.* Cooper, 1 C. M. & R. 387, 394,† where that learned Judge says,—"I agree with what has fallen from my Brother Alderson in the course of the discussion, that, in the later cases, the Courts have deviated far from what was the original meaning of an account stated. I take the rule to be this, that, if there is an admission of a sum of money being due, *for which an action will lie,* that will be evidence to go to the jury on the count for an account stated." And the judgment in the principal case proceeded upon that ground. Gough *v.* Findon, 7 Exch. 48,† is a very strong case. Among the papers of a testator were found two letters, sealed, and directed "For S. G. my late servant." S. G. had been in the service of the testator as housekeeper for some years before his death, but had left him for some years previously to that event. These letters contained promissory notes for large sums of money; and one of the letters stated that the testator enclosed 200*l.* as a mark of respect; and the other letter stated that the enclosed was for her long and faithful services. S. G. applied to the executors for payment of the notes; and, upon seeing the notes, they paid her a portion of the amount, and promised to pay the remainder, but afterwards refused to do so. It was held,—first, that an action was not maintainable by S G. upon the notes, which were in effect a legacy, and an informal

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one, in not being duly attested as required by the Wills Act, 7 W. 4 & 1 Vict. c. 26, and therefore void,—secondly, that the action was not maintainable on the account stated, inasmuch as the promise of the executors was made on a supposed debt, which in fact was not due.

*720] Alderson, B., there says: "An account *stated, to be good, must be founded on a debt then due and owing." Whitehead *v.* Howard, 5 J. B. Moore 105, Lubbock *v.* Tribe, 3 M. & W. 607,† Wells *v.* Girling, 8 Taunt. 737, and Boker *v.* Heard, 5 Exch. 959,† are to the same effect. Where no signed bill has been delivered, the attorney cannot have recourse to the count upon an account stated: Brooks *v.* Bockett, 9 Q. B. 847 (E. C. L. R. vol. 58); Scadding *v.* Eyles, 9 Q. B. 858. In Peth *v.* Lyon, 9 Q. B. 147, the defendant, a widow, being pressed to pay M. a debt owing from her deceased husband to the deceased husband of M., signed and gave to M.'s attorney the following note, addressed to the attorney,—"I beg you will not proceed against me for M., for the sum of 100*l.* and interest, which I owe her; and I will pay the interest, amounting to 9*l.*, due on the 23d of December next, and the principal as soon as I am able:" and it was held that this did not support a count in debt for interest upon, and forbearance by M. to the defendant, at her request, of moneys owing from the defendant to M., nor a count in debt for money found to be due from the defendant to M. on an account stated between them. Lord Denman, in giving judgment, there says: "It may be difficult to say that the memorandum in this case was not evidence of an account stated. But as the witness who drew up that memorandum distinctly proved, on his cross-examination, that the debt was not due from the defendant herself in her own right, nor to the female plaintiff in her own right, but was a debt from the deceased husband of the one to the former husband of the other, the plaintiff failed in showing that the defendant was *indebted* to the female plaintiff on an account stated." In French *v.* French, 2 M. & G. 644 (E. C. L. R. vol. 42), 3 Scott N. R. 121, a promise without consideration to pay the debt of a third person was held not to suffice to support a count upon an account stated.

*721] *In Thomas *v.* Hawkes, 8 M. & W. 140,† it was held, that, under a plea of non assumpsit to a count upon an account stated, the defendant may show that accounts between the plaintiff and himself, the correctness of which he has admitted, were in fact incorrect. "It cannot," says Alderson, B., "be contended that from the mere statement of an account a debt arises. The averment of the declaration is, not merely that an account was stated, but that the defendants were indebted upon it. How can the defendants confess and avoid this allegation? They must confess the being indebted: then, how could they avoid it? They were entitled, therefore, under the general issue, to show that the account did not show them to be indebted, because it was not correct." It is said that all this difficulty is cured by the rule laid down in Lampleigh *v.* Brathwait, Hob. 105, where it was held, that, though a mere voluntary courtesy will not uphold an assumpsit, a courtesy moved by a previous request will. In the notes to that case in 1 Smith's Leading Cases, 5th edit. 139. 140, it is said: "Where the consideration is executed, unless there have been an antecedent request, no action is maintainable upon the promise; for, a request must be laid in the declaration, and proved, if

put in issue, at the trial: Child *v.* Morley, 8 T. R. 610: and see Sutton *v.* Tatham, 10 Ad. & E. 27 (E. C. L. R. vol. 37), 2 P. & D. 308, Stokes *v.* Lewis, 1 T. R. 20, Naish *v.* Tatlock, 2 H. Bl. 320, Hayes *v.* Warren, 2 Stra. 933, Richardson *v.* Hall, 1 Brod. & B. 50 (E. C. L. R. vol. 5), 3 J. B. Moore 307 (E. C. L. R. vol. 4), Durnford *v.* Messiter, 5 M. & Selw. 446. For, although Courts of law will not, in the absence of fraud, enter into the question of *adequacy* of consideration,—Haigh *v.* Brooks, 10 Ad. & E. 309, 323 (E. C. L. R. vol. 37), 2 P. & D. 477, 4 P. & D. 288; Kearns *v.* Durell, 5 C. B. 596 (E. C. L. R. vol. 57); Hart *v.* Miles, 4 C. B. N. S. 371 (E. C. L. R. vol. 93); Skeate *v.* Beale, 11 Ad. & E. 983 (E. C. L. R. vol. 39), 3 P. & D. 597; England *v.* Davidson, 11 Ad. & E. 856, 3 *P. & D. 594,—yet a mere voluntary courtesy is not sufficient to support a subsequent promise: but, when there was a previous request, the courtesy was not merely voluntary, nor is the promise nudum pactum, but couples itself with and relates back to the previous request, and the merits of the party which were procured by that request, and is therefore on a good consideration: see Pawle *v.* Gunn, 4 N. C. 445 (E. C. L. R. vol. 33), 6 Scott 286; Bradford *v.* Roulston, 8 Irish C. L. Rep. 468." The learned editors then go on to enumerate the circumstances under which the request will be implied:—"In certain cases, where the plaintiff voluntarily does that to which the defendant is *morally* though not *legally* compellable, and the defendant afterwards, in consideration thereof, *expressly* promises: see Lee *v.* Muggeridge, 5 Taunt. 36 (E. C. L. R. vol. 1); Watson *v.* Turner, Bul. N. P. 129, 147, 281; Trueman *v.* Fenton, Cowp. 544; Atkins *v.* Banwell, 2 East 505. But every moral obligation is not perhaps sufficient for this purpose: see per Lord Tenterden, C. J., in Littlefield *v.* Shee, 2 B. & Ad. 811 (E. C. L. R. vol. 22). Indeed, it seems to be now clearly settled by the elaborate judgment of the Court of Queen's Bench in Eastwood *v.* Kenyon, 11 Ad. & E. 438 (E. C. L. R. vol. 39), 3 P. & D. 276, that a mere moral obligation, however sacred, is not a sufficient foundation for a binding promise, and that the class of considerations derived from moral obligation includes only those cases in which there has been a legal right which is become devoid of legal remedy. Such, for instance, is the case of a promise made by a debtor whose liability has been barred by the Statute of Limitations." [*722

The policy of the law forbids any third person from acquiring an interest in the result of a suit: Box *v.* Barnaby, Hobart 117; Penrice *v.* Parker, Cas. temp. Finch 75; Thornhill *v.* Evans, 2 Atk. 330. In Viner's Abridgment, *Counsellor*, pl. 22, it is said that, "One *Mr. Dean, who was a barrister at law, having made a bill as a solicitor, a motion was made to tax it, which was granted; but the Court said, that, if he insisted upon having his bill paid, they would hereafter treat him as a solicitor. And Mr. Justice T. Powys said that so it was ruled in Chancery by my Lord Chancellor Harcourt, in the case of one Mr. Alston: and, if *gentlemen would not take fees after the usual manner, they ought not to recover them by any action at law.*" That a counsel can maintain no action for his fees, is clearly laid down by Bayley, J., in Morris *v.* Hunt, 1 Chitt. R. 544, 551. "It is said," observes that learned Judge, "that counsel can maintain no action for their fees. Why? Because it is understood that their emoluments [*723

are not to depend upon the event of the cause, but that their compensation is to be equally the same whether the event be successful or unsuccessful. They are to be paid beforehand, because they are not to be left to the chance whether they shall ultimately get their fees or not: and it is for the purpose of promoting the honour and integrity of the bar that it is expected all their fees should be paid at the time when their briefs are delivered. That is the reason why they are not permitted to maintain an action. It is their duty to take care, if they have fees, that they have them beforehand; and therefore the law will not allow them any remedy, if they disregard their duty in that respect. The same rule applies to the case of a physician, who cannot maintain any action for his fees. He therefore is to receive his fees at the period of time when his attendance occurs. These are the reasons why the gentlemen of these two professions can maintain no actions for their fees." The like law is laid down by Pollock, C. B., in Swinfen *v.* Lord Chelmsford, 5 Hurlst. & N. 890, 920.† "We are
*724] all of opinion," says his Lordship, "that an *advocate at the English bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, express or implied. Cases may, indeed, occur, where on an express promise (if he made one) he would be liable in assumpsit; but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client but the Court in which the duty is to be performed, and the public at large, have an interest." In Poucher *v.* Norman, 3 B. & C. 744 (E. C. L. R. vol. 10), 5 D. & R. 648 (E. C. L. R. vol. 16), the Court, in giving judgment, say: "The general rule is, that any man who bestows his labour for another has a right of action to recover a compensation for that labour. There are two exceptions to that rule, viz., physicians and barristers. The law supposes them to act with a view to an honorary reward." In the other degrees of those professions, parties may recover for their services. An attorney may recover for conveyancing. So, a surgeon may recover for attendance. Then, if that be so, there is nothing to take a conveyancer, who is not a barrister, out of the general rule of law by which a man who bestows his labour for the benefit of another has a right of action for a reasonable compensation for his labour." A barrister is exempted from the operation of the statutes against maintenance. In 2 Inst. 564, it is said: "If the serjeant at law, apprentice, or attorney doe take a feoffment hanging the plea, or the like, to maintaine the tenant, though it be pro suo dando, in lieu of his fee, yet is this champerty within this statute (28 Ed. 1, c. 11); for, their counsell, that is, their advice and direction in their profession of law is excepted; but to take any estate in the land, hanging the writ, for maintenance, is to become a party, and in no sort allowed to them by this act." And see the commentary
*725] *on the statute of Westminster 1 (3 Ed. 1), c. 25, 2 Inst. 209. The old entries relied on all relate to retainers founded upon the practice of the great lords, who found it convenient to have a legal adviser always ready to assist them in their affairs, and have no relation to the employment of counsel in business done in Court. The same remark applies to Mingay *v.* Hammond, Cro. Jac. 482.

The dictum of Wrey, J., in Marsh and Rainsford's Case, 2 Leon 111 (Marsh *v.* Kavenford, Cro. Eliz. 59), clearly is not law: and it derives no additional authority from its being cited as a dictum in Comyns's Digest. [*Kennedy* referred to Moss *v.* Brainbrigge, 18 Beavan 478, 6 De Gex, M'N. & G. 292. There, in the course of a protracted litigation, B. had become indebted to his solicitor in 9377*l.* (as was alleged), of which 4696*l.* had been paid out of pocket. The solicitor agreed to accept 3500*l.* in full for his costs, unless the client recovered the estate, in which case the client agreed to pay the full sum of 9377*l.* The client did not dispute the validity of the agreement until seven years after, when the litigation had been successful. The Court upheld the agreement. ERLE, C. J.—I do not know why a man should not pay a debt out of his real estate as well as out of the balance at his banker's.] This subject came under the consideration of Lord Eldon in a case of Wood *v.* Downes, 18 Ves. 127: and, in giving judgment, his Lordship says: "In Hylton *v.* Hylton, 2 Ves. Sen. 547, it is laid down as clear law, that no attorney can take anything for his own benefit from his client pending the suit, save his demand: and I add, that, as a guardian cannot take anything from his ward pending the guardianship, or at the close of it, or at any period, until his influence has ceased to exist, the obligation upon an attorney to refrain from taking an extraordinary benefit is at least as strong. The case of Wells *v.* *Middleton (cited 9 Ves. 294, 12 Ves. 372, 13 Ves. 52, 138), is an extremely strong case of the same kind. It was admitted that the transaction was liable to no objection as between man and man: but it was overturned, upon this great principle, the danger from the influence of attorneys or counsel over clients while having the care of their property; and whatever mischief may arise in particular cases, the law, with the view of preventing public mischief, says they shall take no benefit derived under such circumstances. It is not denied in any case, that, if the relation has completely ceased, if the influence can be rationally supposed also to cease, a client may be generous to his attorney or counsel, as to any other person: but it must go so far." The policy of the law as to voluntary donations obtained by persons standing in some confidential or fiduciary or other relation towards the donor, in which dominion may be exercised over him, is elaborately discussed in the notes to Huguenin *v.* Baseley, (6 14 Ves. 273). 2 Tudor's Leading Cases 462, 486, 491. The general doctrine is, so far as relates to the relation of counsel or attorney and client, that promises made pending the suit shall not be urged as elements of the contract. The most recent case upon the subject is that of Earle *v.* Hopwood, 9 C. B. N. S. 566 (E. C. L. R. vol. 99), where this Court held that a contract whereby an attorney stipulates with a client to receive, in consideration of large advances requisite to the conducting the proceedings to a successful issue, over and above his legal costs and charges, a sum which would be commensurate with his outlay and exertions, and with the benefit resulting to the client, is void on the ground of maintenance. All the arguments which can be urged against the propriety of permitting bargains of this kind as between attorney and client, apply with tenfold force to the case of barrister and client. [*726

Cur. adv. vult.

*727] *ERLE, C. J., delivered the judgment of the Court:(a)—In this case the defendants obtained a rule to show cause why the verdict for the plaintiff should not be set aside, and either entered for the defendants if there was no evidence of a debt, or for a new trial if the verdict was against the evidence.

The material facts upon the first question are, that, in the course of the suit between Swinfen and Swinfen, the plaintiff, a barrister, became the advocate of Mrs. Swinfen, who with her husband are the now defendants; that, during the continuance of that litigation, she made repeated requests to him for exertions as an advocate, and repeatedly promised to remunerate him for the same; and that, after the end of the litigation, she spoke of the amount of this remuneration; and, for the purpose of the present judgment, we assume that she admitted the amount of debt due for such remuneration to be 20,000*l.*, and promised to pay it.

These facts are no evidence to support the verdict, if the promise of the defendant did not constitute any obligation: and we are of opinion that it did not.

We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect; and, furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation.

For authority in support of these propositions, we place reliance on the fact that in all the records of our law, from the earliest time till now, there is no trace whatever either that an advocate has ever *728] maintained a suit against his client for his fees in *litigation, or a client against an advocate for breach of a contract to advocate: and as the number of precedents has been immense, the force of this negative fact is proportionally great. To this we add the tradition and understanding of the profession both as known to living memory and as expressed in former times. Sir John Davys, —Davys's Reports, Preface, p. 23,—declares that understanding at the beginning of the seventeenth century when he says that "the fees of professors of the law are not duties certain growing due by contract for labour or service, but gifts; not merces, but honorarium." Sir John Davys would have ample experience of the rules of the profession, from his eminence in the law; and his opinion is entitled to much weight. Lord Stowell, as appears in a work remarkable for learned research,—Wallace's Reporters, p. 27,—speaks of him as "a poet, a lawyer, and a statesman, and highly distinguished in each of these characters." Lord Nottingham declares the same understanding of the profession, in the note to Co. Litt. 295 a., saying, "A counsellor cannot bring any action (*i. e.* for his fees), for he is not compellable to be a counsellor: his fee is honorarium, and not a debt." The same note contains the opinion of Mr. Butler to the same effect, saying that in England the fees of counsel are honorary in the strict acceptation of the word. Blackstone also (Vol. III. p. 28) declares the same understanding,—"A counsel can maintain no action for his fees, which are given, not as locatio and conductio, but as quiddam

(a) The Judges present at the argument were, Erle, C. J., Williams, J., Byles, J., and Keating, J.

honorarium, not as salary or hire, but as mere gratuity." As we know of no authorities that conflict with these, we only add the names of the Judges who have had occasion to declare an opinion to the same effect; and they are Lord Hardwicke (Thornhill *v.* Evans, 2 Atk. 330), Lord Kenyon (Turner *v.* Philipps, Peake's N. P. C. 166), Kindersley, V. C. (Re *May, 4 Jurist, N. S. 1169), Pigot, C. B. [*729 (Hobart *v.* Butler, 9 Irish Common Law Rep. 157), and Bayley, J., and Best, J. (Morris *v.* Hunt, 1 Chitt. R. 544). These are authorities for holding that the counsel cannot contract for his hire in litigation. The same authorities we rely on to show that the client cannot contract for the service of the counsel in litigation. There is the same absence of any precedent for such an action: and the reason for the one incapacity is good for both.

We proceed to the authorities on which the plaintiff relied. Instead of examining each citation separately, we think it more convenient to take them in classes, and to give the reason why each class appears to us to have no weight. The proposition is confined to incapacity for contracts concerning advocacy in litigation. This class of contracts is distinguished from other classes on account of the privileges and responsibility attached to such advocacy: and, on this ground, we consider the cases unconnected with such advocacy to be irrelevant. Thus, the barrister who contracted to serve as returning officer, —Egan *v.* The Guardians of the Kensington Union, 3 Q. B. 935, n. (E. C. L. R. vol. 43); and the barristers who contracted to serve as arbitrators,—Vivary *v.* Warne, 4 Esp. N. P. C. 46; Hoggins *v.* Gordon, 3 Q. B. 466; Marsack *v.* Webber, 6 Hurlst. & N. 1, 5;† and the barristers who contracted either for an annual sum by way of retainer (39 H. 6, fo. 21, pl. 31), or for an annuity pro consilio impenso et impendendo (Plowd. Com. pp. 32, 160),—made contracts not concerning litigation, and therefore not within the incapacity here in question.

It may be that a contract for a general retaining fee for a counsel may not bind at the present day, because it relates in substance to litigation, and so may be distinguished from annuities to a standing counsel who *was required to guide by his advice in the management of property and general affairs. The change in the [*730 habits of the Courts and the practice of the bar since the last-mentioned cases were decided, has probably made the position of an advocate now as different from that of standing counsel then, as the position of the clergy now differs from that which they held when private chaplains were hired to serve as chaplains and perform other work, and were prosecuted for breach of their contracts to serve, under the statute of the 23 E. 3 relating to labourers,—in one of which prosecutions against a parochial chaplain for breach of his contract to serve as seneschal and be parochial chaplain, the Court of Common Pleas thought, that, as far as related to his duty as chaplain, he might be considered to be in the service of God, and therefore not within a statute expressed to relate to mowers and reapers and the like, but hesitated so to decide till they had consulted their Brethren of the other Bench, and had their sanction. But, be that as it may, fees unconnected with litigation are irrelevant to our present judgment: and this distinction seems to be taken in Mingay

v. Hammond, Cro. Jac. 482, where the plaintiff sued for an annuity pro consilio; the defendant pleaded a refusal of the plaintiff to sign a bill in the Star Chamber; and the plea was held bad, because a counsellor with such a fee is not bound to put his hand to every bill, but only to give counsel.

With respect to the dicta cited by Mr. *Kennedy* relating to the liability of counsel for their conduct as advocates, they are all considered and overruled in the action of Swinfen *v.* Lord Chelmsford, 5 Hurlst. & N. 918.† Some refer to retainers relating to purchases of land or similar services, and so are not within the incapacity here in question: 11 H. 6, fo. 18, pl. 10. And, although the dictum of Pas-
*731] ton, J. (14 H. 6, fo. 18, pl. *58), "that action lies against a serjeant who fails to attend in court," and a dictum by Stoke, counsel, 20 H. 6. fo. 34, pl. 4 (Rol. Abr. vol. I., p. 91), to the same effect, relate to litigation, yet they are mere remarks in the course of an argument, and not adjudications; and they were expressly overruled, as before mentioned.

Mr. *Kennedy* cited Rastell's Entries, p. 2, as containing precedents for actions against an attorney *or counsel* for not appearing in Court according to his retainer: but the book contains no entry against a counsel for that wrong. There are three entries in succession. The first is against an attorney, and is for that wrong. The second precedent is against a counsel who was retained to advise about the purchase of a manor, and betrayed his client's secrets and interest, and is not an entry which relates to litigation. And the third is against a counsel; but it is for a penalty under a statute, for taking retainers on both sides, as an ambidexter. The citation from Rastell, therefore, does not support the plaintiff's argument.

A considerable part of Mr. *Kennedy's* learned research consisted of anecdotes of various classes relating to barristers, irrelevant to the point for adjudication because irrelevant to capacity or incapacity for contracting for advocacy. Such are the anecdotes relating to the habits of barristers when they held communication with their clients personally, before the rights and duties of attorneys and solicitors were ascertained, and the advocate did the work of each branch of the profession,—habits which continued in Jersey till lately: see Jersey Bar Case, 13 Moore's P. C. 263. Such also are those relating to alleged endeavours by barristers to obtain larger fees. Whether this has been done or not, and whether a communication in respect of the
*732] amount of the fee be made to the client by the clerk *or the barrister, the nature of the fee is not altered, nor is the right to sue for it affected thereby. Such also are those relating to payment after instead of before the service is performed. In England, the general usage is, prepayment. On the continent, under the Roman law and the modern French law, and in some exceptional cases in England, the fee is paid after the service. But, again, the nature of the fee is not altered by the time of payment. The anecdotes in each of these classes show that the payments are of gratuities, and not of debts; and, so far as they are to be noticed for adjudication, tend to support the defendants' case.

As to express contracts,—Certain dicta by Pigot, C. B. (Hobart *v.* Butler, 9 Irish Common Law Rep. 157), and by Pollock, C. B. (Swin-

fen *v.* Lord Chelmsford, 5 Hurlst. & N. 918 †), were cited for the purpose of proving that a barrister had capacity to make himself liable under a *special* contract with his client concerning advocacy, though not by an implied contract. We think that the effect of these dicta has been misunderstood. A special contract differs from an implied contract only in the mode of proof. If a brief marked with a fee for a given place of trial is left in silence, there would be some evidence of an implied contract to pay the fee, were there no usage to the contrary, and no incapacity for such a contract. If the same brief is left with an express contract to pay the fee, there would be an express contract, if there were no incapacity. Where the service of the barrister according to usage is for a gratuity, that usage would be presumed to continue unless there was an express contract rebutting that presumption: and, where there is no incapacity, the presumption from usage is rebutted by an express contract. Pollock, C. B., does not refer to any authorities: but the cases referred to *by Pigot, C. B., show that this was his meaning; for he refers [*733
to the cases above mentioned, where barristers, either as returning officers or as arbitrators, sustained actions on express contracts for their fees. The incapacity depends on the subject-matter of the contract, not on the mode of proof. When the contract is proved, its incidents are the same, whatever was the kind of evidence adduced for proof. If there is incapacity, words and implication are alike nullities; and no contract can result. But, where there is no incapacity, and there are conflicting presumptions in respect of the consensus essential to create contract, there evidence of express words of clear meaning is decisive proof. In this sense the observation of Wood, V. C., in The Attorney-General *v.* The College of Physicians, 1 Johnson & Heming 561, must be understood, saying "that a physician might recover his fee if he makes a special contract." We know of no incapacity affecting a physician. According to usage, physicians practise for a fee which is honorarium, not merces; and no action lies where the parties are presumed to have acted according to this usage. But, if the presumption is rebutted by evidence of an express contract, such contract binds, and the physician may sue and be sued thereon, as was held in Veitch *v.* Russell, 1 Car. & M. 362, 3 Gale & D. 198, 3 Q. B. 937 (E. C. L. R. vol. 43).

Mr. *Kennedy* argued, that, under the Civil law, an advocate could sue for his fee, and that Blackstone made a mistake in referring thereto to support a contrary opinion. In this it appears to us that the mistake is on the part of the plaintiff. Throughout the whole growth of the Civil law, from the foundation of Rome to the Digest of Justinian, not only was the advocate always under incapacity to make any contract for his remuneration, but also throughout a part of that time he was under prohibition from receiving *any gain for his [*734
services. Whether the name be donum or merces or honorarium, is immaterial: the substance of the law was invariable; he never could contract for merces, though during part of the time he might lawfully accept a donum. In the beginning, all agree that the patron received no money for advocacy. Afterwards, he took gifts to an excess, and was restrained, in A. U. C. 550, by the Lex Cincia De donis et muneribus, ne quis ea ob causam orandam caperet. If gifts

were prohibited, à fortiori contracts for payments would not be allowed. This prohibition of all gifts for advocacy was further enforced by Augustus, A. U. C. 732, commanding advocates to plead gratuitously; and for breach they were ordered to refund fourfold.

This prohibition against all gifts to advocates was relaxed in a time of great debasement, when, according to the passage in Tacitus referred to by Blackstone (Annal. lib. XI. 5), nec quidquam publicæ mercis tam venale fuit, quam advocatorum perfidia. The senate sought to enforce the Cincian law forbidding all gifts, for protection against abuses on the part of advocates. Suilius, an advocate of singular infamy, offered some of the arguments which have been urged here in support of mercenary advocacy. The emperor took an intermediate course, and by a decree fixed the maximum which an advocate might lawfully receive by way of gift at 80*l.*, and made him liable to refund if he took more. The words of Tacitus are,—"Claudius capiendis pecuniis modum statuit ad dena sestertia, quem egressi repetundarum tenerentur."

The senate made a further effort in the same direction, passing a law that every suitor, before he took any step in the suit, should swear that he had neither given nor contracted to give any money for advocacy. Pliny, in the passage referred to by Blackstone, Epist.
*735] *Lib. 5, 21, writing of a new edict by a prætor to enforce practically some recent laws, says,—"Sub edicto erat Senatus consultum. Hoc omnes qui quid negotii haberent priusquam agerent jurare jubebantur nihil se ob advocationem cuiquam dedisse, promisisse, cavisse. His enim verbis, ac mille præterea, et vœnire advocationes, et emi vetabantur. Peractis tamen negotiis permittebatur pecuniam duntaxat decem millium dare."

Although after this time gifts within the limited amount were lawful, still contracts with advocates during litigation are not shown to have been ever at any time sanctioned by the law of Rome. Mr. *Kennedy* referred to the Digest, Lib. 50, Tit. 13, sections 10 and 12, to prove that an advocate could sue for his fee under the extraordinary cognisance of the Præses. But we do not find that these articles prove his contention. Section 10 seems to relate to a suit by a client against an advocate to make him refund so much of a fee already paid as exceeded the legitimate amount, and gives the principle for estimating what that amount should be. "In honorariis advocatorum ita versari debet judex, ut pro modo litis, proque advocati facundiâ, et fori consuetudine, et judicii in quo erat acturus, estimationem adhibeat; dummodo licitum honorarium quantitas non egrediatur." The article concludes with a rescript applicable only to refunding part of a fee, "eam duntaxat pecuniam quæ modum legitimum egressa est repetere debet." Section 12 relates to securities and bargains for fees, and gives the rule when a suit can be maintained thereon. The effect seems to be, that a promise while the litigation is pending does not bind; but a security given after the cause is at an end may be enforced, if the sum secured together with the sums paid do not exceed the legitimate amount. Article 12 is thus,—"Si cui cautum
*736] est honorarium, vel si quis de *lite pactus est, videamus an petere possit? Et quidem de pactis ita rescriptum est. Litis ----& malo more pecuniam tibi promissam ipse quoque profiteris; sed

hoc ita jus est, si suspensâ lite societatem futuri emolumenti cautio pollicetur: si vero post causam actam cauta est honoraria summa, peti poterit usque ad probabilem quantitatem, etsi nomine palmarii cautum sit, sic tamen ut computetur id quod datum est cum eo quod debetur neutrumque compositum licitam quantitatem excedat."

We have now considered as much of the authorities referred to as seems to us to be relevant; and in our judgment they support the proposition in which the defendants rely, viz. that the relation of counsel and client in litigation creates an incapacity to contract for hiring and service as an advocate.

If the authorities were doubtful, and it was necessary to resort to principle, the same proposition appears to us to be founded on good reason.

The facts of the present case forcibly show some of the evils which would attend both on the advocate and the client if the hiring of counsel was made binding. In this case, the advocate, by disclosing words of intimate confidence which passed in moments of helpless anxiety, has raised the phantom of a contract for a sum of monstrous amount; and of this we hope we may say that there is no one in the profession of the plaintiff who would be willing to accept from him this verdict for 20,000*l.* as a gift. In the present case, too, if the client compares the competence and peace secured for her by her former advocate with the perils and the miseries of wearisome litigation derived from her later advocate, the contrast may suggest to her that gratuitous advocacy is preferable to contract as a mode of remunerating advocates.

But it is not merely on such considerations as these *that this law is based. The incapacity of the advocate in litigation [*737 to make a contract of hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests, viz. the administration of justice.

We are aware, that, in the class of advocates, as in every other numerous class, there will be bad men, taking the wages of evil, and therewith also for the most part the early blight that waits upon the servants of evil. We are aware also that there will be many men of ordinary powers, performing ordinary duties without praise or blame But the advocate entitled to permanent success must unite high powers of intellect with high principles of duty. His faculties and acquirements are tested by a ceaseless competition proportioned to the prize to be gained, that is, wealth and power and honour without, and active exercise for the best gifts of mind within. He is trusted with interests and privileges and powers almost to an unlimited degree. His client must rely on him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interests of social life, and the innermost feelings of the human soul. The law also trusts him with a power of insisting on answers to the most painful questioning; and this power, again, is in practice only controlled by his own view of the interests of truth. It is of the last importance that the sense of duty should be in active energy proportioned to the magnitude of these interests. If the law is, that the

advocate is incapable of contracting for hire to serve when he has undertaken an advocacy, his words and acts ought to be guided by a sense of duty, that is to say, duty to his client, binding him to exert
*738] every faculty and *privilege and power in order that he may maintain that client's right, together with duty to the court and himself, binding him to guard against abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right.

If an advocate with these qualities stands by the client in time of his utmost need, regardless alike of popular clamour and powerful interest, speaking with the boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to the client; and such men are the guarantees for the maintenance of his dearest rights; and the words of such men carry a wholesome spirit to all who are influenced by them.

Such is the system of advocacy intended by the law requiring the remuneration to be by gratuity. But, if the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty,—that words sold and delivered according to contract, for the purpose of earning hire, would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness; and that the standard of duty throughout the whole class of advocates would be degraded. It may also well be, that, if contracts for hire could be made by advocates, an interest in litigation might be created contrary to the policy of the law against maintenance; and the rights of attorneys might be materially sacrificed, and their duties be imperfectly performed by unscrupulous advocates: and these evils, and others which might be suggested, would be unredeemed by a single benefit that we can perceive.

The subject has been often and ably discussed; so that we have
*739] already said more than sufficient. We *would only add, that, in the growth of the English law, the advocates have been important agents in establishing the liberty of thought and speech and action which has resulted from the contests in courts where such liberty has been contended for. The English advocates in our historical trials are entitled to be gratefully remembered: and it must not be forgotten that their minds were trained in the practice of advocacy without any contract. So also the Roman jurists are entitled to be gratefully remembered, because their intuitive sense of right showed to them where right was in the conflicts of interest perpetually arising as the relations of man to man multiplied: and their words have helped to guide succeeding generations in their search for right when similar conflicts arose. And it must not be forgotten that throughout the Roman system it was held that an advocate and a professor of law would be degraded by a contract of hiring, and that his reward was to be gratuitous.

Mr. *Kennedy* has cited the Digest, Lib. 50, Tit. 13, articles 10 and 12, on which we have remarked above. The title relates to the limits of the extraordinaria cognitio of the Præses: and it may not be superfluous to add article 5, expressly excluding therefrom suits by the

class of professors of law, for a reason applicable to all advocates,—"Ne juris quidem civilis professoribus jus dicent; est quidem res sanctissima civilis sapientia: sed quæ pretio nummario non sit æstimanda nec dehonestanda: * * * quædam enim tametsi honestè accipiantur inhonestè tamen petuntur."

On principle, then, as well as on authority, we think that there is good reason for holding that the relation of counsel and client in litigation creates the incapacity to make a contract of hiring as an advocate. It follows that the requests and promises of the defendant, and the services of the plaintiff, created *neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise. By reason of that incapacity the present case is distinguished from Lampleigh *v.* Brathwait, Hobart 105, and the cases following thereon. In all of them the defendant was assumed to have received from the plaintiff such a valuable consideration as would have made a valid contract if a promise had been made before the consideration had passed. Here, the defendant received nothing from the plaintiff which was capable of forming a consideration to support a promise at whatsoever time such promise may have been made. In Lampleigh *v.* Brathwait, it was assumed that the journeys which the plaintiff performed at the request of the defendant, and the other services he rendered, would have been sufficient to make any promise binding if it had been connected therewith in one contract; the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably, at the present day, such service on such request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount. [*740

On the same principle, the cases cited in sequel to Lampleigh *v.* Brathwait are also distinguished. In each of those cases the defendant had by the permission of the plaintiff received value belonging to the plaintiff which was sufficient to support any promise. As to one class, the original promise was excluded by the Statute of Frauds, but a subsequent promise was held to be evidence to support an action on an account stated: Pinchon *v.* Chilcott, 3 C. & P. 236 (E. C. L. R. vol. 14); Seago *v.* Deane, 4 Bingh. 459 (E. C. L. R. vol. 13), 1 M. & P. 227; Cocking *v.* Ward, *1 C. B. 858 (E. C. L. R. vol 50). As to another class, a claim in equity to money was converted into a cause of action at law by an express promise to pay it to the plaintiff: Roper *v.* Holland, 3 Ad. & E. 99 (E. C. L. R. vol. 30), 4 N. & M. 668; Topham *v.* Morecraft, 8 Ellis & B. 972 (E. C. L. R. vol. 92); Moor *v.* Hill, Peake's Add. Cas. 10. For these reasons, we think that the plaintiff's case is not within the principle of Lampleigh *v.* Brathwait: and we do not consider it to be our duty to extend the application of that principle. [*741

With respect to the claim for compensation for leaving Birmingham and coming to London, and for services in issuing publications for the purpose of creating a prepossession in favour of the defendant, there are several answers, of which two will suffice. The first is that these services were ancillary to the service as an advocate: and, if the prin-

cipal service could not be the subject of a contract, neither could any service which was merely accessory thereto, and of no value without the principal. The second is, that the account is stated of the total of the claims: and, if any one of the claims of undefined amount is to be omitted, the statement of the account is disproved, and the action founded upon such statement of account fails.

We have now gone through the whole of the case; and we come to the conclusion that the plaintiff has not established a cause of action. It follows that the rule must be made absolute to enter the verdict for the defendants.

If the judgment on this part of the rule should be reversed in a Court of error, it will then become our duty to dispose of the remaining part, relating to a new trial; and following the precedent in Betts
*742] v. Menzies, 28 Law J., Q. B. 370, 1 Ellis & Ellis *990 (E. C. L. R. vol. 102),(a) we order the part of the rule relating thereto to be suspended until further order.

Rule absolute accordingly.

(a) The Judgment of the Court of Queen's Bench in Betts v. Menzies, was affirmed in the Exchequer Chamber (1 Ellis & Ellis, 1020 (E. C. L. R. vol. 102); but it was reversed by the House of Lords.

In a note to the principal case, which was written by the accomplished Philadelphia editor of the American Law Register, 2 Am. L. R., N. S. (1863) 372, the question as to the propriety of lawyers suing for their fees is discussed in the best taste, and the authorities are judiciously commented upon.

What impresses the reader of Chief Justice Erle's admirable opinion is the tone of judicial severity in which he passes sentence, as it were, upon Mr. Kennedy. The moral weight of professional sentiment must be immense, when its official exponent ventures to find an historical parallel for a fellow-member in "Suilius, an advocate of singular infamy." The *esprit de corps* of the fraternity must have been outraged by Mr. Kennedy's conduct, or such language would not have been justified by his fellow-barristers.

It is impossible to doubt that this feeling of dignity intensifies the self-respect, and thus fortifies the character of its possessor. And where vast responsibility rests it is of the utmost importance that integrity should be guaranteed by all possible securities. Chief Justice Gibson, it is true, poured out his unmeasured scorn upon the "dignity of the robe," as he was pleased to term it, which he looked upon as an antiquated fashion: Foster v. Jack, 4 Watts 334: If, however, his anticipation proves to be correct, and dignified bearing does go out of vogue, the elevated type of character, of which it is the outward expression, will assuredly disappear with it. Such a blast of contempt for what is ordinarily deemed estimable, provokes a contrast between the periods in which such opposite views prevail; and few will venture to dispute the superior eminence, of the lawyers who either practised or were educated in the days when Chief Justice Tilghman with highbred and dignified courtesy presided over the deliberations of the Supreme Court, and gave tone to the Bar of Pennsylvania.

One of the earliest cases is Brackenridge v. M'Farland, Add. (Penn. C. P. 1793) 49, in which that eccentric

man, afterwards Judge Brackenridge, was allowed to recover, under the direction of the Court, what the jury considered a just compensation for his services as counsel. This case, however, was overruled after full consideration in Mooney *v.* Lloyd, 5 S. & R. (1819) 411, by the Supreme Court, with the concurrence of all the Judges. In Gray *v.* Brackenridge, 2 Penn. (1830) 75, Judge Gibson changed sides, and united with Judge Smith against Judge Rogers in overruling Mooney *v.* Lloyd. He afterwards justified his position on the ground that the profession is a mere *trade:* Foster *v.* Jack, 4 Watts (1835) 334. As the law now stands in that state a counsellor may recover his fees like an attorney: Baulsbaugh *v.* Frazer, 7 Harris (1852) 95; Dubois's Appeal, 2 Wr. (Pa. 1861) 231. In New Jersey the high-toned ruling of the principal case obtains, and no suit can be brought by an advocate to recover compensation for his professional services: Seeley *v.* Crane, 3 Green (1835) 35; Van Alta *v.* McKinney, 1 Harrison (1837) 235. But the other States adopted the later Pennsylvania view: Thurston *v.* Percival, 1 Pick. (Mass. 1823) 415; Ames *v.* Gilman, 10 Met. (Mass. 1845) 239; Stevens *v.* Adams, 23 Wend. (N. Y. 1840) 257; Adams *v.* Stevens, 24 Id. (1841) 451; Wilson *v.* Burr, 25 Id. (1841) 386; Merritt *v.* Lambert, 10 Paige Ch. (N. Y. 1843) 352; Wallis *v.* Laubat, 2 Denio (1845) 607; Stevens *v.* Monges, 1 Harrington (Del. 1832) 127; Duncan *v.* Breithaupt, 1 McCord (S. C. 1821) 149; Clendinen *v.* Black, 2 Bailey (S. C. 1831) 488; Christy *v.* Douglas, Wright (Ohio 1834) 485; Baird *v.* Ratcliffe, 10 Texas (1853) 81; Webb *v.* Browning 14 Mo. (1851) 354; Newman *v.* Washington, Mart. & Yerg. (Tenn. 1827) 79; Rust *v.* Larue, 4 Littell (Kentucky 1823) 411; Caldwell *v.* Shepherd, 6 Mun. (Ky. 1827) 389.

SHERBORN *v.* TOLLEMACHE, commonly called LORD HUNTINGTOWER. *Jan.* 31.

An action will not lie upon the implied contract contained in the defeasance of a warrant of attorney.

An attempt to enforce a warrant of attorney nearly twenty years old by a motion to enter up judgment thereon in the Court of Queen's Bench, having been defeated by the bankruptcy and certificate of the defendant, an action was afterwards brought in this Court upon the implied contract contained in the defeasance:—The Court set aside the proceedings as being against good faith.

LUSH, Q. C., on a former day in this term, obtained a rule nisi to stay the proceedings in this cause, on the ground that the action was brought against good faith, and on the grounds that the same, being brought on a warrant of attorney more than ten years old, was an attempt to evade the rule of Court that leave to enter up judgment on a warrant of attorney more than ten years old is to be obtained by order of a Judge made on a summons to show cause, and also to evade an order of the Court of Queen's Bench discharging a rule obtained by the plaintiff in Michaelmas Term last for entering up judgment on the said warrant of attorney; and that no action will lie on a warrant of attorney.

The affidavits upon which the motion was founded stated amongst other things, that the writ in this action was issued on the 26th of November, 1862, and the declaration delivered on the 6th of January, 1863, setting forth a warrant of attorney, bearing date and executed by the defendant on the 5th of December, 1842, authorizing judgment to be entered up in
*743] the *Court of Queen's Bench against him at the suit of the plaintiff for 8400*l.*, and also a defeasance to the said warrant of attorney bearing date and executed by the defendant on the same day, in which it was stated that the warrant of attorney was given to secure the payment from the defendant to the plaintiff on the 5th of December, 1843, of 4223*l.*, with interest at 5 per cent., and alleging as a breach the non-payment of the 4223*l.* and interest: That the said warrant of attorney, and a certain other warrant of attorney to enter up judgment in the Court of Queen's Bench for 43,300*l.*, given by the defendant at the same time to one Edward Sherborn, deceased, the brother of the plaintiff, and to whom he was administrator, were respectively given by the defendant to the plaintiff and his said brother (who claimed to be creditors of the plaintiff on certain bills of exchange) to induce them to withdraw their opposition to the grant of a certificate in bankruptcy to the defendant, then a prisoner in the Queen's Prison: That, on the 6th of July, 1853, the defendant was again adjudicated a bankrupt, and on the 19th February, 1854, obtained his certificate under such last-mentioned bankruptcy: That, on the 1st of November last, the plaintiff caused a summons to be taken out in the Court of Queen's Bench calling upon the defendant to show cause why he (the plaintiff) should not be at liberty to enter up judgment on the said warrant of attorney so given by the defendant to him as aforesaid, and in the affidavit used by him in support of the said summons on the hearing thereof alleged that the sum then due to him in respect of the sum purporting to be secured by the said warrant of attorney was 8403*l.*; and that, on the same day, the plain-

tiff, as administrator of his brother, Edward Sherborn, caused a summons to be taken out in the Court of Queen's Bench calling upon the plaintiff to *show cause why he should not be at liberty [*744
to enter up judgment on the said warrant of attorney so given by him to the said Edward Sherborn as aforesaid, and in the affidavit used by him in support of the last-mentioned summons alleged that the sum then due to him as administrator of the said Edward Sherborn as aforesaid in respect of the sum purporting to be secured by the last-mentioned warrant of attorney was 43,066*l.*: That the defendant filed affidavits in opposition to the said summonses respectively, to the effect, amongst other things, that he had been adjudicated a bankrupt on the 6th of July, 1853, and had obtained his certificate under the said bankruptcy on the 19th of February, 1854, and was thereby discharged from all liability upon the said warrants of attorney: That the said summonses came on to be heard before Blackburn, J., on the 18th of November last, when that learned Judge declined to make an order, on the ground of such discharge: That, on the 22d of November last, the plaintiff obtained rules in the Court of Queen's Bench calling on the defendant to show cause why he should not be at liberty to enter up judgments on the said warrants of attorney respectively, and, in support of his application for the said rules, caused an affidavit to be filed by his attorney, setting forth certain alleged facts for the purpose of showing that the certificate obtained by the defendant under his last-mentioned bankruptcy was void by reason of gaming or wagering or concealment of property: That cause was shown against the said rules respectively on the defendant's behalf on the 25th of November last; and that, in opposition to the said rules, the defendant made affidavit denying specially all and each of the alleged facts set forth in the said affidavits of the plaintiff's attorney for the purpose of showing that the defendant's said certificate was void as aforesaid; and *that, on the hearing of the said rules, [*745
the counsel for the plaintiff urged the Court to grant an issue to try whether the certificate was void or not; but that the Court refused to grant such issue, and discharged the said rules respectively, on the ground that the defendant was discharged from all liability on the said warrants of attorney respectively by his said bankruptcy and certificate, and that no sufficient grounds had been laid before the Court to show that the defendant's certificate was void: And that, on the 26th of November last, the writ in this action was issued, and also a writ against the defendant at the suit of the plaintiff as administrator of Edward Sherborn, which last-mentioned writ the defendant believed to have been issued in respect of the warrant of attorney so given by him to the said Edward Sherborn as aforesaid.

The learned counsel submitted that this was an improper attempt to evade the control which the Courts exercise over warrants of attorney: and he referred to Harries *v.* Thomas, 2 M. & W. 32,† and Gibbs *v.* Ralph, 14 M. & W. 804,† to show that the proceedings will be stayed where an action is continued or a fresh action brought after the withdrawal of a juror; to Dent *v.* Basham, 9 Exch. 469,† and Hookpayton *v.* Bussell, 10 Exch. 24,† to show that no action will lie upon a Judge's order; to Clarke *v.* Figes, 2 Stark. N. P. C. 234 (E. C. L. R. vol. 3), where it is laid down by Lord Tenterden that a warrant

of attorney cannot be declared on; and to Shaw *v.* The Marquis of Worcester, 4 M. & P. 21, 6 Bingh. 385, to show that a warrant of attorney is not an instrument upon which it is necessary to assign breaches under the statute 8 & 9 W. 3, c. 11, s. 8, such an instrument not appearing, as Tindal, C. J., says, to be within the mischief of the Act, "for, the Courts of common law might at any time, of their own *746] proper jurisdiction, receive *an application, and afford redress, if the instrument were made the means of oppression or injustice."

WILLIAMS, J.—The declaration here seems to treat the defeasance as an implied covenant to pay the money. The action may be a wild experiment: but the question is whether we have authority to suppress it in this way. If you think it worth while, you may take a rule.

Coleridge, Q. C., and *Holl* showed cause.—The defeasance contains an express agreement on the part of the defendant to pay the money: and, assuming that the plaintiff's remedy upon that may be doubtful, the Court will not deprive him of an opportunity of arguing it upon demurrer. Clarke *v.* Figes, 2 Stark. N. P. C. 234 (E. C. L. R. vol. 3), does not affect this case: the question was whether a warrant of attorney was an instrument of specialty, and so an answer to a plea that the cause of action did not accrue within six years. And in Shaw *v.* The Marquis of Worcester, 4 M. & P. 21, 3 Bingh. 385 (E. C. L. R. vol. 11), it was not suggested that the warrant of attorney might not have a collateral operation quite independent of its technical character. In Monypenny *v.* Monypenny, 9 House of Lords Cases 114, the House of Lords held that a grantee, by deed of settlement on marriage, of an annuity charged on lands, in which deed the grantor (there being no fraud) declared himself entitled in fee simple to the lands charged, might treat such declaration as a covenant, and, upon its afterwards appearing that the grantor had really only a life estate, might proceed against his estate to obtain payment of the arrears of the annuity. There are many cases in which a deed may be used for a purpose which was not in the minds of the parties at the time of its *747] execution. [WILLES, J.—But not in a *manner inconsistent with it.] If the argument on the part of the defendant be well founded, the point is open to him on demurrer. No precedent has been cited for so extraordinary an interference as this. [WILLES, J.—The substance of the agreement between the parties to the warrant of attorney is, that, in case of default, there shall be a judgment without a writ. Instead of acting upon that, the plaintiff saddles the defendant with the costs of an action. Besides being substantially wrong, therefore, the proceeding is technically wrong. In Farrall *v.* Hilditch, 5 C. B. N. S. 840 (E. C. L. R. vol. 94), an indenture made between the plaintiff and defendant recited that the former was seised or entitled to certain hereditaments and premises, subject to a mortgage and further charge, that he was indebted to the defendant in the sum of 100*l.* for goods sold and delivered, that the defendant had commenced an action against him to recover the same, and that the plaintiff, being desirous of staying the action and of securing to the defendant the payment of his debt, had proposed and agreed to convey the hereditaments and premises to him, subject to the encumbrances,

upon certain trusts for securing the same. It then recited as follows, —"And it has also been agreed between the [plaintiff] and [defendant] that he the [defendant] shall be at liberty to sign judgment in the said action so commenced against the [plaintiff] as aforesaid, *but that no execution shall issue thereon until this present security be realized.*" The indenture then proceeded to convey the premises to the defendant upon certain trusts. This Court held that the latter recital amounted to a covenant by the defendant not to issue execution until the realization of the security,—because *no* such agreement existed independently of the deed.]

Lush, Q. C., in support of his rule, submitted that *the circumstance of no instance being found of an action being [*748 brought upon a warranty of attorney, was of itself almost decisive of the question. He was then stopped by the Court.

ERLE, C. J.—I am of opinion that this rule should be made absolute. A warrant of attorney is an instrument having certain known properties, making the party giving it liable to certain known proceedings: and the Courts have from time immemorial exercised an extensive control over the proceedings to enforce payment of the money. To allow the creditor to bring an action upon it, would be to give him a totally different remedy from that which the practice has hitherto given him. The judgment of the Court in Shaw *v.* The Marquis of Worcester, 4 M. & P. 21, 6 Bingh. 385 (E. C. L. R. vol. 19), contains a statement of the doctrine on which I rely. The question there was whether it was necessary to assign breaches under the 8 & 9 W. 3, c. 11, s. 8, on a warrant of attorney given as a security for an annuity: and Tindal, C. J., said: "As the law stood at the time this Act was passed, if there was a judgment in a Court of law for a penal sum, either upon a demurrer, or upon a cognovit actionem, or by default, the defendant was exposed to the danger of an execution for the whole penalty, and had no mode of preventing such an inconvenience but by filing a bill in equity; and the statute was penned to prevent such a mischief, by compelling the plaintiff to show upon the record in the Court of common law the amount of the debt and damages really due, and of enabling the defendant to dispute such amount before a jury; thus making an appeal to a Court of equity altogether unnecessary. But a warrant of attorney to enter up a judgment as a security for a debt on demand was known in practice to the Courts of common law long *before the Statute [*749 of William. It was a proceeding subject to their cognisance and interference from the earliest times, and has been regulated by various rules of Court, as the protection of the defendant or the purposes of justice seemed to demand. Such an instrument, therefore, does not appear to be within the mischief of the Act; for the Courts of common law might at any time, of their own proper jurisdiction, receive an application and afford redress, if this instrument were made the means of oppression or injustice." I think it would be quite contrary to the spirit and intention of the instrument that it should be made the foundation of an action. This, therefore, being a proceeding against good faith, the rule for staying the action must be made absolute.

WILLIAMS, J.—I am entirely of the same opinion. It is perfectly

obvious, that, when a man gives a warrant of attorney, he gives it upon the understanding that the sole remedy of the creditor against him upon it is by entering up judgment thereon. To do that which it was the understanding of the parties he should not do, clearly is a breach of good faith.

WILLES, J.—I am of the same opinion. The law has provided a special mode of recovering a debt secured by a warrant of attorney, viz., by entering up judgment. To proceed to recover it by action would be wholly inconsistent with the object and intention of the party giving such a security.

KEATING, J.—I am of the same opinion. It would entirely frustrate the intention of the parties, to allow an action to be brought upon a supposed implied covenant contained in the defeasance of a warrant of attorney. Rule absolute.

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*750] *HURST and Others v. SHELDON. *Jan.* 31.

An equitable claim is not the subject of an interpleader summons.

THIS was an action brought by the plaintiffs, who are boatmen at Ramsgate and Broadstairs, to recover the sum of 1500*l.* which was agreed to be paid by the defendant to the plaintiffs for their services and assistance with boats or luggers in and about the salvage of the brig Elizabeth (belonging to the defendant) and her cargo and freight from loss by perils of the sea, or, in the event of a failure to prove such agreement, for such amount of compensation as a jury might think fit to give the plaintiffs for such services. The declaration was delivered on the 24th of December last. On the 8th of December the defendant received the following notice of claim:—

"8th December, 1862.

"*Elizabeth.*

"Dear Sir,—Understanding that you are about to pay the sum of 1500*l.* to the Broadstairs and Ramsgate boatmen in this case, I beg to inform you that my clients, the master, owners, and crew of the steam-tug Ruby, claim to participate therein, and that it is my intention to apply to the Judge of the Admiralty Court for a monition calling upon you to pay the said sum of 1500*l.* into the registry of the Court, to abide his decision. This monition shall be applied for and served as soon as possible, and in the mean time you will please to consider this as a notice not to part with any portion of the said sum. "W. ROTHERY."

On the 1st of January instant the defendant took out and served upon the plaintiffs and the claimants an interpleader summons, as follows:—

751*] *"Let the plaintiffs, and Thomas James Holland, the captain, and the owners and crew of the steam-tug Ruby, the claimants &c., attend me, &c., to show cause why they should not appear and state the nature and particulars of their respective claims in this cause, and maintain or relinquish the same, and abide by such order as may be

made herein: and why in the mean time all further proceedings should not be stayed."

It was objected on the part of the plaintiffs that their demand in the action was for a sum of 1500*l.* agreed to be paid to them for their services, and wholly independent of any claim on the part of any other person. The learned Judge (Byles, J.) expressed some doubt whether he had power under the circumstances to make an order; but, inclining to think that the 112th section of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126) gave him such power,(*a*) he ordered as follows:—

"Upon hearing the attorneys or agents on both sides, and for Thomas James Holland, the captain, and the owners and crew of the steam-tug Ruby, &c., I do *order that the defendant do pay the plaintiffs the sum of 1500*l.*, being the whole amount of the plaintiffs' claim upon the defendant (except 12/27ths thereof), which 12/27ths are to be paid by the defendant into Court: And I direct an issue to be tried between the plaintiffs on the one side and the captain, owners, and crew of the Ruby on the other side, and that the defendant defray the costs to this date: And I reserve all further questions herein, and direct all further proceedings against the defendant to be stayed." [*752

Lush, Q. C., on a former day in this term, on the part of the plaintiffs, obtained a rule nisi to rescind this order.—The circumstances under which this claim arises are disclosed in an affidavit made by Holland, the master of the Ruby (which is made an exhibit to the affidavit in support of the interpleader summons), from which it appears that the Elizabeth being in distress off the North Foreland, a lugger from Dover went to their assistance, and after leaving four of its crew on board, the rest proceeded in search of a steam-tug, and, falling in with the Ruby, agreed with the master to allow him 12/27ths of the amount of salvage recovered, if he would join them. The master of the Ruby accordingly proceeded with two of the lugger's crew in search of the Elizabeth, but was unable to meet with her. In the mean time the plaintiffs had gone out with their luggers from Ramsgate and Broadstairs, and succeeded in carrying the Elizabeth into Yarmouth, for which service the owner agreed to give them 1500*l.* The master and owners of the Ruby, claiming a share of the salvage, commenced a suit in the Admiralty Court against the owner of the Elizabeth. Under these circumstances, the case is clearly not one for an interpleader summons. The parties are not claiming the same matter. It may be that *the master and owners of the Ruby have an equitable claim on the owner of the Elizabeth: [*753

(*a*) That section enacts, that, "where an action has been commenced in respect of a common law claim for the recovery of money or goods, or where goods or chattels have been taken or are intended to be taken in execution under process issued from any one of the superior Courts, or from the Court of Common Pleas at Lancaster or the Court of Pleas at Durham, and the defendant in such action, or the sheriff or other officer, has applied for relief under the provisions of the 1 & 2 W. 4, c. 58, it shall be lawful for the Court or a Judge to whom such application is made to exercise all the powers and authorities given to them by this Act and the hereinbefore-mentioned Act, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another."

but they have no common interest with the plaintiffs in the sum agreed to be paid to the latter for their services.

Mellish, Q. C., showed cause.—[WILLES, J.—This is hardly a case for an interpleader. The persons whom you represent, viz., the captain, owners, and crew of the Ruby, could not sue the defendant.] The claim of the captain and owners of the Ruby, no doubt, is an equitable one. [WILLES, J.—When the last Common Law Procedure Act was in its progress through Parliament, efforts were made to give the Courts of common law powers which would have embraced such a case as this: but those efforts were successfully opposed.]

Murphy appeared for the defendant.

PER CURIAM.—The order must be rescinded; but without costs.

Rule absolute, without costs.

LOCKE v. MATTHEWS. *Jan.* 22.

In 1830, A. enclosed about six acres of waste land and built a cottage thereon, and was allowed to remain in possession without acknowledgment or payment of rent down to the year 1845, when the steward of the owner of the fee served him with a declaration and notice in ejectment; whereupon A. consented to give up four acres of the land, on his being allowed to continue in possession of the cottage and the other two acres until his death. A. died in 1861:—Held, that that which took place in 1845 amounted to an actual entry, and operated as a determination of the original tenancy at will and the creation of a new tenancy, and consequently that the period of limitation prescribed by the 3 & 4 W. 4, c. 27, was to be reckoned from that time.

THIS was an action of trespass brought to try the right to the possession of a cottage and two acres of land in the county of Somerset.

*754] *There were several pleas, amongst others one setting up a twenty years possession under the Limitation Act, 3 & 4 W. 4. c. 27, s. 2.

The cause was tried before Keating, J., at the last Assizes at Wells, when the facts which appeared in evidence were as follows:—Certain waste lands in the parish of Wiveliscombe were, in the year 1830, allotted by the award of a Commissioner under an Enclosure Act passed in 1828 (9 G. 4, c. 13, private). A piece of about six acres of a waste called Slape Moor, part of that which was allotted to one Beadon, the lord of the manor, but which, being utterly worthless, was not enclosed by him, was some time in the year 1830 enclosed by Thomas Locke, the father of the plaintiff, who built a cottage thereon, and continued in possession down to the year 1845 without interruption, and without paying any rent. In 1840, Lord Ashburton purchased Beadon's interest in the manor; and in 1845, one Reeves, Lord Ashburton's steward, came to Locke's cottage, telling him that he must give up the land, and that it had become Lord Ashburton's property. Old Locke thereupon said that the late owner had given it to him for his life, and that it was very hard that he should be turned out. Shortly afterwards, Reeves went again to the cottage and served Locke with a declaration and notice in ejectment. Locke was at this time confined to his bed; and when he got better he called on Reeves,

and obtained his consent (on the part of Lord Ashburton) that he (Locke) and his wife should retain possession of the cottage and two acres of the land for their respective lives. Nothing further was done until the year 1861, when, Locke and his wife being both dead, the land in question was added to one of Lord Ashburton's farms in the occupation of the present defendant.

On the part of the plaintiff, it was insisted that old *Locke [*755 had acquired a title by twenty years' possession under the 3 & 4 W. 4, c. 27, s. 2, and that his title could not be defeated by anything short of a written acknowledgment of title in Lord Ashburton, or payment of rent, under s. 14.

For the defendant it was submitted that what passed between Locke and Reeves, Lord Ashburton's steward, in the year 1845, amounted in point of law to a determination of the then existing tenancy at will, and a creation of a new tenancy at will, and that consequently the twenty years were to be reckoned from that time.

The learned Judge was of this latter opinion; and under his direction the jury returned a verdict substantially for the defendant, reserving leave to the plaintiff to move to enter it for him if the Court should be of opinion that the learned Judge ought to have ruled upon the evidence that Thomas Locke had obtained an indefeasible title under the statute,—the Court to have power to draw such inferences of fact as a judge or jury ought to draw.

Sir F. Slade, in Michaelmas Term last, obtained a rule nisi accordingly.

Karslake, Q. C., and *Kingdon* now showed cause.—That which occurred in 1845 clearly amounted to a determination of the old tenancy at will, and the creation of a new tenancy. At that time no title had been acquired; and the period of limitation would run from the commencement of the new tenancy. The question turns mainly upon the 7th, 10th, and 14th sections of the Limitation Act, 3 & 4 W. 4, c. 27. The 7th section enacts "that, when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of *the person entitled [*756 subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." The 10th section enacts that "no person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon." And the 14th section provides, "that, when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him,

to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given." It will be contended on the part of the plaintiff that nothing short of an acknowledgment in writing or a payment of rent will defeat his title under the statute. But any act on the part of the lessor or the owner of the fee which is inconsistent with the continuance of the estate at will, operates to determine it: per Hale, C. J., in Hinchman *v.* Iles, Ventris 247. What was done here was clearly inconsistent with the *757] *continuance of the original tenancy at will: and, if any solemn act was required, that is supplied by the giving up of four out of the six acres. The matter is well put by Parke, B., in delivering the judgment of the Court in Doe d. Bennett *v.* Turner, 7 M. & W. 226.† There, A., in 1817, let B. into possession of lands as tenant at will; and in 1827 A. entered upon the land without B.'s consent, and cut and carried away stone therefrom: and it was held that this entry amounted to a determination of the estate at will. "The finding of the jury," says the learned Baron, "necessarily supposes, that, after the determination of the will in 1827, a new tenancy at will was constituted. The effect of this was to destroy the right of action which had accrued in 1818; for, it is clear, that, after creating a new tenancy at will, the lessor of the plaintiff could bring no action until that new tenancy was determined. This construction is in strict conformity with the language of the 7th section, which provides that the right of action shall accrue at the end of the first year next after the commencement of *such* tenancy, *i. e.* of the tenancy under which the tenant is actually holding, not at the end of one year next after the commencement of any preceding tenancy." A new trial having been directed in that case because the attention of the jury was not called to the point that the effect of a determination of the will was to make a tenancy by sufferance only, during which the landlord might have brought his ejectment without any demand of possession or other act, and that such tenancy at sufferance would continue until the parties created a new tenancy at will by fresh agreement between them, express or implied,—the cause went down again, and Gurney, B., told the jury, in summing up, that the acts of the lessor of the plaintiff amounted to a determination of the defend- *758] ant's original tenancy at will, and *that it was for them to consider whether a new tenancy at will had been created by the parties, and that, if they thought it had, they must find for the lessor of the plaintiff, because such tenancy at will would not be determined, under any construction of the 3 & 4 W. 4, c. 27, ss. 2, 7, until 1827, and the ejectment, having been commenced in Easter Term, 1840, would be within twenty years of the determination of such tenancy: and this ruling was affirmed in error, upon a bill of exceptions,—see Turner *v.* Doe d. Bennett, 9 M. & W. 643,† where Lord Denman, in giving judgment, says: "The intent of an entry is undoubtedly in many cases important; but, in the case of a tenancy at will, whatever be the intent of the landlord, if he do any act upon the land for which he would otherwise be liable to an action of trespass at the suit of the tenant, such act is a determination of the will, for so only can it be a

lawful and not a wrongful act." Randall *v.* Stevens, 2 Ellis & B. 641 (E. C. L. R. vol. 75), is precisely in point. Before the passing of the 3 & 4 W. 4, c. 27, viz. at Whitsuntide, 1818, Randall was let into possession of land as tenant at will to the overseers. He never paid rent. After the statute passed, and before twenty-one years had elapsed from Randall being so let into possession, viz. in April, 1839, the overseers entered and turned Randall out. Randall immediately afterwards resumed possession; but no fresh tenancy at will commenced; and he paid no rent. It was held that the overseers might enter at any time before the lapse of twenty years from such resumption of possession by Randall, though after the lapse of twenty-one years from the first letting Randall into possession, and were not barred by ss. 2, 7, 10 of the statute. Lord Campbell says: "It is not disputed, that, in April, 1839, the overseers determined the tenancy at will which had subsisted since Whitsuntide, *1818, before [*759 the Statute of Limitations had run; and they were then actually in possession of the cottage. When the plaintiff again took possession of the cottage, a right to make an entry upon it accrued to them: and we conceive that they were entitled to enter at any time within twenty years from that day. It is admitted that they might have brought an ejectment the following day, and at any time before twenty-one years had expired from Whitsuntide, 1818. But, how could the right of entry which subsisted from April, 1839, to Whitsuntide, 1839, be then barred? The right of entry in respect of which they entered in July, 1852, first accrued in April, 1839, and would not be barred till April, 1859." So, here, there was an express determination of the will in 1845, and an express agreement for a new tenancy from that time in respect of the cottage and two acres of the land.(*a*)

Sir F. Slade, Q. C., and *Prideaux*, in support of the rule.—The general scope and intention of the statute was, that all rights of entry should be absolutely barred after the lapse of the prescribed period, unless there was some deliberate act done to determine the will. If the argument on the part of the defendant be well founded, the 14th section was wholly unnecessary. It is absolutely necessary that there should be some act done upon the land. No mere statement or threat on the part of the owner of the land will have any effect. Even a notice to quit not acted upon does not operate as a determination of the will. In Hinchman *v.* Iles, Ventris 247, in the case put by Lord Hale, the tenant assented to what the lessor said. In Doe d. Bennett *v.* Turner, 7 M. & W. 226,† the act of the landlord, entering upon the land and taking and carrying away stone from a quarry [*760 *on the estate, was wholly inconsistent with the continuance of the tenancy at will. So, in Randall *v.* Stevens, 2 Ellis & B. 641 (E. C. L. R. vol. 75), there was an actual eviction: the tenant and his family were turned out, and his goods removed. In neither of those cases was the attention of the Court called to the 14th section of the statute. In the present case, no act of ownership was exercised by Lord Ashburton: nor was there any eviction, but only a threat. It is true, there was evidence that the tenant agreed to give up a portion of the land: but there was no new tenancy created as to

(*a*) See Doe d. Baker *v.* Coombes, 9 C. B. 714 (E. C. L. R. vol. 67).

that part which he continued to hold. In Doe d. Stanway *v.* Rock, 4 M. & G. 30 (E. C. L. R. vol. 43), in 1816, A. let B. into possession of lands under an agreement for purchase which was never completed. B. continued in possession until his death in 1822, without having paid rent. He devised all his real estate to C., his widow, who entered into possession of the premises. Rent was demanded of her in 1827, which she promised to pay, but did not. In ejectment for the premises, brought in 1842 by parties claiming under A., it was left to the jury to say whether a tenancy at will had been created between A. and C.,—the action being otherwise barred by the 3 & 4 W. 4, c. 27, s. 7: and it was held by this Court that the direction was a proper one.

ERLE, C. J.—I am of opinion that this rule should be discharged. This is a claim by the plaintiff of a right to the land which he is supposed to have derived from the kindly forbearance of the owner of the fee simple. It appears that one Thomas Locke, through whom the plaintiff claims, was in the year 1830 allowed by the then lord of the manor to enclose a piece of the waste and to build a cottage; and that, on Lord Ashburton becoming the owner of the manor, he determined to remove him. He did not carry that determination
*761] *into effect by actually turning Locke out: but I am of opinion that by what then took place the then existing tenancy at will was put an end to. In ordinary cases, an estate at will is effectually put an end to by a clear expression of the determination of the will: but this statute requires some more decided act on the part of the owner of the land, to prevent the acquisition of a title by one who remains in possession. It appears to me, however, that a great deal more was done here than a mere expression of an intention to determine the will. The tenant is told that he must go out; and the owner of the fee simple enters by his agent, and serves the tenant with a declaration in ejectment, indicating in clear and unmistakable terms that he must give up the land, and doing that which would amount to a trespass if there were any existing legal estate in the tenant. The original tenancy at will having been thus put an end to, the agent of the owner of the fee, on the party pressing him with the hardship of being turned out after having so long enjoyed the occupation, kindly consents to his remaining in possession of the cottage and two acres of the land for the life of himself and his wife. Thomas Locke and his wife having died, the plaintiff now comes forward and insists, that, as there was no actual eviction, and no acknowledgment in writing, or payment of rent, the period of limitation prescribed by the statute is to be reckoned from the time the original tenancy at will commenced, and not from the time of the new arrangement in 1845. I think it would be a gross perversion of the statute, to hold that such an act of kindly forbearance on the part of the owner of the fee should work a forfeiture. The law is not so harsh as to require that the tenant shall be forced to pay rent or be actually turned out. The object of
*762] the statute, and a very beneficial one, is, to prevent the *bringing up of dormant titles after many years have been allowed to elapse. It requires that persons who have rights shall enforce them within certain limited periods. It takes up a large class of cases in which parties who had been long in uninterrupted enjoyment of

estates had great difficulty in showing that their possession was adverse. It is in these sections that there has been great capability of carrying the provisions of the Act far beyond the intention of the legislature. The words of the 7th section are, "that, when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at *will*, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." And the 34th section enacts, "that, at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, *shall be extinguished*." Therefore, after twenty-one years from the commencement of the tenancy at will, the title of the real owner is absolutely barred or extinguished, unless such title is preserved to him by some of the other provisions of the statute. On the part of the plaintiff it is insisted that there has been such an uninterrupted adverse possession as to bar the title of the owner, because he says that there was a tenancy at *will in Thomas Locke [*763 when the agent of Lord Ashburton, in 1845, consented that he and his wife should continue in possession, and that that tenancy at will continued undetermined down to the time of their deaths in 1861. The fact, however, fails: the original tenancy did not continue: and it is clear, that, to satisfy the words of the section I have referred to, it must be the *same* tenancy for the whole twenty-one years. If a new tenancy at will is created, the twenty years are to begin to run from the period at which such new tenancy commenced. That is the ground upon which in point of fact I think the plaintiff fails. The statute has, no doubt, been careful to prevent persons who have enjoyed a long uninterrupted possession of lands from being turned out upon frivolous pretexts; for, the 10th section enacts that "no person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon." This, as the Court of Queen's Bench observe in Randall *v.* Stevens, "evidently applies to a *mere entry*, as, for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night time, and pronouncing a few words, without any attempt, or intention, or wish to take possession." "In the present case," they go on to say, "possession was actually taken by the overseers animo possidendi: and, whether possession was retained by them an hour or a week, must for this purpose be immaterial. They were lawfully in of their fee-simple title; and by nothing that had previously happened could their right in respect of the Statute of Limitations be at all prejudiced." That explains why the Court in their judgment in that case go so elaborately into the facts. It is said that the 14th section ought to govern this case. That section

*764] provides, "that, when any acknowledgment of the *title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one was given." But there are no words there which say that nothing shall, after the tenancy has once begun, prevent the claim of the owner of the land from being barred by lapse of time, unless there be an acknowledgment in writing or a payment of rent. It has only pointed out two of the modes by which the owner may save himself from forfeiting the fee simple: but it does not at all affect the construction of the 7th section, under which there must be one continuous tenancy. If the owner enters effectively, and creates a new tenancy at will, he has twenty-one years from that period before he can forfeit his estate. For these reasons, I am of opinion that the plaintiff has failed to make out his alleged right, and consequently that the rule to enter the verdict for him upon the remaining issues must be discharged.

*765] WILLES, J.(a)—I am of the same opinion. I entirely *agree with what my Lord Chief Justice has said about the 7th section, the construction of which is not affected by either the 10th or the 14th section. It is clear that Locke, when he entered on the six acres in 1830, became tenant at will. He was in the condition of the feoffee mentioned in Littleton, § 70,—"If a man make a deed of feoffment to another of certaine lands, and delivereth to him the deed, but not liverie of seisin; in this case he to whom the deed is made may enter into the land, and hold and occupie it at the will of him which made the deed, because it is proved by the words of the deed that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him." Was that tenancy at will determined? What occurred was this. In 1845, the then owner of the fee intended to take away from his tenant at will the whole of the land which he had occupied, and, in order to carry that intention into effect, brought an action of ejectment. At the intercession of a third person, however, he subsequently consented that the tenant at will should continue in the occupation of the cottage and a portion of the land; whereupon a new tenancy at will was created in respect of the cottage and the land so retained. The period of twenty years had elapsed when this action was brought from the creation of the first or original tenancy at will, but not from the creation of the new tenancy. The question is, whether, in applying the 7th section of the 3 & 4 W. 4, c. 27 to this state of things, we are to consider the original tenancy at will as being still in existence. Now, it is perfectly ele-

(a) Williams J., was absent by reason of indisposition.

mentary, that an entry upon any part of the land puts an end to the tenancy at will: and the reason is obvious, because the tenancy is of the whole, and the tenancy cannot therefore be determined as to part without determining it as to the whole. The *Lord Chief Justice has demonstrated that the 7th section does not mean that [*766 the twenty years shall begin to run from the end of the first year after the person who shall have been in possession or in receipt of the profits of the land, shall have begun to hold in the capacity of tenant at will generally, but from the end of the first year after the commencement of the tenancy at will which existed next previously to the question being raised whether a title has been acquired under the statute. For this purpose, the right of entry did not first accrue until the expiration of one year after the transaction which took place in 1845, and therefore no title has been gained by lapse of time as against the freeholder. I also agree in the construction which my Lord has put upon the 10th section. When the 11th section is looked at in conjunction with the 10th, it is clear that those sections apply to the entry spoken of in the 417th section of Littleton and Lord Coke's commentary thereon. The tenancy at will being put an end to, the tenant at will became thenceforward a trespasser, or at the most a tenant at sufferance: and upon this a doubt has been suggested, which the Court of Queen's Bench in Randall *v.* Stevens, 2 Ellis & B. 652 (E. C. L. R. vol. 75), deal with thus:—"A number of cases were cited in the argument to show, that, if, after the determination of the tenancy at will, independently of the statute, the tenant continues in possession at sufferance till the expiration of twenty-one years from the commencement of the tenancy, the statute is a bar. We do not consider it necessary on this occasion to consider these cases: and it may be too late now to consider, except in a Court of error, whether, where the tenant has remained in possession continuously for twenty-one years, the tenancy at will being determined during that time by an act of the landlord without his actually having been in *possession, there be any ground for the distinction as to the [*767 operation of the statute between a subsequent tenancy at sufferance and a new tenancy at will, which is allowed to create no bar. It may be, that, on the true construction of the statute, the periods of the original tenancy at will and the subsequent tenancy on sufferance could not under such circumstances be united so as to make up the period of limitation required by the statute: but, in order to raise that point, recourse must be had to a Court of error." It appears to me, however, that that which took place here created a new tenancy at will. The owner of the fee entered upon the land for the purpose of taking possession of it and turning out the tenant at will. At the intercession of the tenant, he was allowed to retain a part of the land, and as to that part, with his consent, a new tenancy at will was created. It would operate gross injustice if the period of limitation under the statute were not held to run from the time when that entry took place.

KEATING, J.—I am of the same opinion. It was not disputed at the trial that old Locke originally held the land in question as tenant at will. Lord Ashburton having become the owner of the fee, his steward Reeves determined to put an end to that tenancy, and for

that purpose made an entry on the land and served Locke with a declaration in ejectment. Locke perfectly well knew what was the object of that proceeding. He complained to Mr. Milton; and Mr. Milton promised to intercede for him. An arrangement was ultimately come to, under which he was to hold the cottage and garden, but not the rest of the land; and he obtained a verbal promise that he and his wife should retain possession of the part so left to them
*768] for the rest of their lives. That clearly constituted a new *tenancy at will. All that occurred within twenty years. There was nothing, therefore, to bar the right of Lord Ashburton, and the defendant is entitled to succeed. Rule discharged.

BROWNLOW and Others *v.* THE METROPOLITAN BOARD OF WORKS and AIRD. *Jan.* 12.

The Metropolitan Board of Works have no power under the 135th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, to erect any works on the bed or soil of the Thames.

They may do so under the 2d section of the 21 & 22 Vict. c. 104, provided they obtain the consent of the admiralty, pursuant to s. 27.

The board having, with the consent of the Thames conservators under the 21 & 22 Vict. c. 104, s. 28, but without the consent of the admiralty, driven piles into the bed of the river, and so left them as to obstruct the navigation, —Held, that they were liable to an action at the suit of the owner of a vessel which sustained damage by grounding on such piles, without any negligence on the part of those in charge of her.

THIS was an action by the plaintiffs to recover compensation for damage sustained by their ship Zebra in consequence of her having come into collision with certain works constructed by the defendants on the shore of the river Thames.

The first count of the declaration stated that theretofore, and before the injury to the plaintiffs' ship thereinafter mentioned, the defendants wrongfully placed in a certain common navigable river and highway, to wit, the river Thames, certain piles and pieces of timber and works, and wrongfully kept and continued the same therein until the happening of the injury to the plaintiffs' ship thereinafter mentioned, and thereby greatly obstructed the due and proper navigation of the said river, by reason whereof the plaintiffs' ship called the Zebra, then lawfully navigating the said river, ran and struck upon the said piles, pieces of timber, and works, and was by reason thereof greatly injured; and the plaintiffs were thereby put to great expense in discharging the cargo of the said ship, and in repairing the said injury,
*769] and *replacing her stores, and were deprived of the use and employment of the said ship for a long space of time.

The second count stated that the plaintiffs, before and at the time of the happening of the injury thereafter mentioned, were lawfully possessed of a ship called the Zebra, then lawfully navigating a certain common public navigable river and highway, to wit, the Thames; and the defendants, before and at the time of the happening of the injury thereinafter mentioned, were erecting and constructing certain works in and upon the bed of the said river Thames, and in a part of the said river along which ships were in the habit of navi-

gating and had a right to navigate; which said works then interfered with the free navigation of the river, of which the defendants always had notice: yet that the defendants so carelessly, negligently, and improperly conducted themselves in the erection and construction of the said works, and so carelessly, negligently, and improperly erected and constructed the same, without taking due and proper precautions to protect ships passing along the said river, and so carelessly, negligently, and improperly omitted to take any steps to indicate to ships passing along the said river the existence, extent, and position of the said works, that by reason thereof the said ship of the plaintiffs, while so navigating the said river as aforesaid, struck upon the said works and was greatly damaged, and the plaintiffs were thereby put to great expense in discharging her cargo, and in repairing the said ship, and replacing her stores, and thereby lost the use and employment of the said ship for a long space of time: Claim 10,000*l.*

Pleas by the Metropolitan Board of Works,—first, not guilty,—secondly, to the first count, that the acts, works, matters, and things whereof the plaintiffs complained in the said first count, were lawfully done, performed, and executed by them under and by *virtue and in pursuance and in exercise of the powers contained in [*770 and given to the said Metropolitan Board of Works by an Act passed in a session of Parliament holden in the 18th and 19th years of Her present Majesty (c. 120), for the better local management of the metropolis, and of an Act of Parliament passed in the session of Parliament holden in the 21st and 22d years of Her Majesty (c. 104), for, amongst other things, extending the powers of the Metropolitan Board of Works, for the purification of the Thames, and the main drainage of the metropolis; and that all conditions were performed and all things and events done and happened which by law were required for the proper execution and performance of the said acts, works, and things in the said first count mentioned,—thirdly, as to the second count, that the defendants repeated the allegations in the second plea, mutatis mutandis.

Pleas by the defendant Aird,—first, not guilty,—secondly, to the first count, that the said acts, matters, and things whereof the plaintiffs had complained in the said first count, were acts, matters, and things which might lawfully be done, performed, and executed by the defendants the Metropolitan Board of Works under and by virtue of the powers and provisions contained in and given to the said Metropolitan Board of Works by "an Act for the better local management of the metropolis," and "an Act to alter and amend the Metropolis Local Management Act, 1855, and to extend the powers of the Metropolitan Board of Works for the purification of the Thames and the main drainage of the metropolis;" and that he the defendant Aird did perform and execute all the said acts, matters, and things as the servant of the said Metropolitan Board of Works, and by their authority and directions; and that the same were duly and properly done, performed, and executed in accordance with the *provisions of [*771 the said Acts of Parliament respectively, and in pursuance and exercise of the powers thereby given to the said Metropolitan Board of Works as aforesaid; and that all conditions were performed, and all things and covenants were done and happened which by law were

required for the proper doing, performing, and executing the said acts, matters, and things in the first count mentioned,—thirdly, as to the last count, that the defendant Aird repeated as to that count and the matters therein complained of, all the allegations of the second plea above pleaded by him, mutatis mutandis.

Upon these pleas respectively issues were joined.

The cause came on to be tried before Williams, J., at the Summer Assizes at Croydon in 1861.

At the trial the facts appeared to be as follows:—The plaintiffs were the owners of a screw-steamer named the Zebra, of the burthen of 426 tons, which vessel, on the 30th of December, 1860, was proceeding, under charge of a Trinity-House pilot, with a cargo on board, down the river Thames, on a voyage to Malta, Corfu, and other ports in the Mediterranean. In the course of her passage down, the vessel, in attempting to pass to the southward of a tier of vessels moored in the said river, ran against a buoy, and the steering apparatus of the Zebra was thereby disabled, whereby she became unmanageable, and she in consequence ran on shore, taking the ground forward. After the vessel had so run on shore, she swung round with the tide, and it was discovered that she was making water; and upon examination, upon the tide falling, it was found that certain piles which formed part of certain works constructed by the defendants the Metropolitan Board of Works, through their contractor, the defendant John Aird, and which works were so constructed upon the bed of the river
*772] Thames partly *above and partly below low-water mark, had run into and through the vessel's bottom. If the said piles had not been there, the ship would at the fall of the tide have grounded on the mud in the bed of the river, and floated again on the rise of the tide, without receiving any injury. For the damage thus occasioned to the plaintiffs' said vessel this action was brought.

The works of which the said piles formed part were commenced by the defendants after the 28th of March, 1860; and the nature of these appeared by the contract of that date between the Metropolitan Board of Works and the defendant Aird, pursuant to which the same were executed.

The existing sewer mentioned in the contract, is the Earl Sewer. one of the sewers mentioned in Schedule D. of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, and is by s. 135 of that Act vested in the Metropolitan Board of Works.

Before the contract of the defendants above referred to, the Earl Sewer discharged itself into the Thames at high water, and upon the bed or shore of the river when the tide had fallen. The object of the defendants' works was, to discharge the surplus water from the Earl Sewer into the river at low water through an iron pipe or tube let into the bed of the river and covered with concrete. No part of the pipe was visible at low water: its end was covered with planking to protect it, which planking was bolted to piles driven into the bed of the river. There was contradictory evidence as to whether or not these piles had been cut off level with the shore, and also as to whether or not the piles or any of them were below low-water mark. The works were designed and executed in accordance with the con-

tract. There are numerous other outlets of sewers running into the Thames similar to the outlet of the Earl Sewer.

*The plaintiffs' vessel ran ashore on the west side of the [*773 above-mentioned works, and close to them, and she then swung round with the tide; and, upon the tide falling, she settled down upon them, crushed in the planking and some of the piles, broke one of the lengths of the iron pipe, and did considerable damage to the works: but she would, as before stated, have taken the ground safely, but for the defendants' works.

There was no evidence that the works had previously to their commencement been sanctioned or approved of by the lord high admiral or the commissioners for executing the office of lord high admiral, or that they had been so approved of at all; but the consent of the Thames conservators had been obtained. A great deal of evidence was given on both sides as to whether or not the defendants' works did interfere with the navigation of the river.

On the part of the plaintiffs it was insisted that the works constructed by the defendants in the bed of the river were negligently and improperly constructed, and, having been constructed without the sanction and approval of the Board of Admiralty, as required by the 105th section of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), and by the 27th section of the Metropolis Local Management Act Amendment (21 & 22 Vict. c. 104), they constituted an unlawful obstruction to the free navigation of the river Thames, and a public nuisance.

On the part of the Metropolitan Board of Works, it was submitted that they were not responsible for the injury caused to the plaintiffs' ship by the construction of their works, inasmuch as those works were authorized by the several Acts of Parliament regulating the powers of the Commissioners of Sewers (for which body the Board was substituted), and particularly by *the 135th section of the Metro- [*774 polis Local Management Act, 18 & 19 Vict. c. 120; and, further, that, being a public body constituted and acting gratuitously for the benefit of the public, they were not responsible for the negligence of their contractor.

For the defendant Aird it was also contended that he was not responsible, all that he did having been done under and in pursuance of his contract with the Metropolitan Board of Works, and under the express directions and superintendence of the engineers of the Board.

It was further contended on behalf of all the defendants, that the plaintiffs themselves, by the negligence and want of skill of their pilot in the navigation of their ship, and so placing her in a part of the river where it was unusual and improper for a vessel of her tonnage to be, were the authors of the mischief.

The learned Judge in his summing up told the jury, that, in his opinion, the negligence, if any, on the part of the captain and the pilot was not the proximate cause of the damage; and that a person who diminishes the means of security to vessels navigating any part of the river Thames interferes with the navigation: and he left to them the following questions:—

"1. Was the pilot guilty of want of ordinary skill or want of ordinary prudence or care in doing what he did? 2. Did the works of

the defendants interfere with the navigation of the river Thames? 3. Were the piles cut off level with the shore? 4. Was there any neglect of duty on the part of the defendants, in not giving notice by a barge or flag of the existence of the works? 5. Were the leading piles driven in above or below low-water mark, with reference to the plan submitted to the conservators of the Thames?"

To these several questions the jury returned the following answers:—

*775] *"1. The pilot was not guilty of any want of skill or care. 2. The works did interfere with the navigation. 3. The piles projected from the shore at one end. 4. Precautions ought to have been taken, but the jury are unable to say by whom. 5. Three of the leading piles were above low-water mark, that is, nearer the shore than the line of low-water mark given by the admiralty."

Upon these answers, the learned Judge directed a verdict to be entered for the plaintiffs; reserving leave to the defendants to move to enter it for them upon both or either of the counts in the declaration, if the Court should think them not liable.

M. Chambers, Q. C., in Michaelmas Term, 1861, on the part of the Metropolitan Board of Works, obtained a rule nisi to enter a verdict for them, on the grounds,—"first, that they were a public body acting gratuitously, and exercised due care and skill in and about the works complained of,—secondly, that the act or acts complained of were the act or acts of the contractor employed by the Board,—thirdly, that the Board were justified in doing the acts complained of, under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, and the Main Drainage Act, 21 & 22 Vict. c. 104, or one of them,—fourthly, that the injury complained of did not result from the alleged improper acts of the defendants." He also submitted that the verdict was against the weight of evidence as to the question of negligence on the part of the pilot and his being lawfully navigating in the spot to which he had (improperly, as it was alleged,) allowed the vessel to drift. But as to this the Court declined to grant a rule, there being a conflict of evidence, and the learned Judge who tried the cause not being dissatisfied with the verdict.

*776] **Hawkins*, Q. C., on behalf of the defendant Aird, also obtained a rule nisi to enter a verdict for him, or a nonsuit, or for a new trial "on the ground that the works were lawful under the Acts of Parliament, for the reasons relied upon by the other defendants, the Metropolitan Board of Works, and stated in the rule granted on their behalf,—with liberty to contend that the finding of the jury on the third and fifth questions left to them, if material, are against the weight of the evidence;" or why a verdict should not be entered on the second count for the defendant Aird, or a new trial be had, on the grounds,—"first, that there was no such negligence as alleged,—secondly, that, if there was, it was not the cause of the accident, and that the defendant Aird was not responsible, being merely a servant of the other defendants, and acting under and in accordance with their instructions,—thirdly, that the verdict was against the evidence."

Bovill, Q. C., and *Honyman*, in Hilary Term last, showed cause.—The plaintiff, the owner of a vessel lawfully navigating the river Thames, complains of an injury to his vessel arising from the improper

construction by the defendants of certain works in the bed of the river. It was proved at the trial, that, if the obstruction in question had not been there, the plaintiff's vessel (which, after the finding of the jury, must be assumed to have been properly where she was,—the jury having negatived negligence and want of skill on the part of the pilot under whose charge she was), would have grounded on the mud, and sustained no injury. The obstruction which caused the damage consisted of certain piles which had been driven into the bed of the river, three within and one without low-water mark, by the defendant Aird, the contractor employed by the Board, who was acting under the *immediate superintendence and direction of their engineers. [*777
The defendants sever in their defence,—the Board contending, that, as a public body acting gratuitously, they are irresponsible; that they were justified, under the Acts of Parliament under which they are constituted and their duties are defined, in doing what they did; and further, that, if there was any actionable negligence in the mode of doing the work, the contractor alone is responsible. The other defendant, the contractor, on the other hand, insists that he as contractor, having acted under the orders of the engineers of the Board, is under no responsibility for works properly carried out by him in pursuance of his contract. This is not like the case of a public body employing a contractor who by his negligent performance of the duty intrusted to him causes damage to an individual. Here, the thing which caused the mischief was precisely the thing which the contractor was employed to do: it was done under the immediate superintendence of the engineers of the Board, and was adopted and approved of by them. The Board rely mainly upon the authority conferred upon them by the Metropolis Local Management Act, 18 & 19 Vict. c. 120. The 43d section constitutes the Metropolitan Board of Works a corporation, and empowers them to take, purchase, and hold land for the purposes of the Act,—the principal one being the making a provision for the better sewerage and drainage of the metropolis. The 149th empowers the Board to enter into contracts for carrying the Act into execution. The main reliance of the defendants is upon the 135th section, which vests in the Board all the existing sewers and works, and empowers them to "make such sewers and works as they may think necessary for preventing all or any part of the sewerage within the metropolis from flowing or passing into the river Thames in or near the metropolis," and *"such diversions or alterations of [*778
any existing sewers or works vested in them under this Act as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis." There is nothing in that Act which authorizes any interference with the Thames. But that is put beyond all reasonable doubt by subsequent Acts of Parliament. The Thames Conservancy Act, 20 & 21 Vict. c. cxlvii., which passed two years later, in s. 54 enacts that "it shall not be lawful for any person whomsoever to erect, build, or make any embankment, or any erection, building, or work in or upon the bed or shore of the river Thames, or to drive any piles thereon or in the said river, without the permission of the conservators;" and in s. 105, that "no works upon the bed or shores of the said river Thames below high-water mark shall at any time be commenced or executed under the direction or

with the sanction or permission of the conservators, without the same having been previously approved of by the lord high admiral or the Commissioners for executing the office of lord high admiral; such approval to be from time to time signified in writing under the hand of the secretary to the admiralty; or, if such approval be not previously obtained, without proper conditions being made to provide for the immediate removal of all such works upon notice from the admiralty, under the hand of the secretary, requiring the same to be removed." Then came (in 1858) the Metropolis Local Management Act Amendment, 21 & 22 Vict. c. 104, the title of which is "An Act to alter and amend the Metropolis Local Management Act, 1855, and to extend the powers of the Metropolitan Board of Works for the purification of the Thames and the main drainage of the metropolis." The 2d section empowers the Board to "construct any work through, *779] along, over, or under the bed and soil *and banks and shores of the river Thames, making compensation to all persons having any interest in any wharfs, jetties, or other property damaged by such works, as provided by the 18 and 19 Vict. c. 120 in respect of property injured under the powers of such Act." The 24th section enacts that the board "shall cause all works to be executed under this Act to be constructed and kept so as not to be a nuisance." The 27th section,—which is the important section,—enacts that "no works upon the bed or shores of the said river Thames below high-water mark, which may interfere with the navigation of that river, shall at any time be commenced or executed under the provisions of this Act, without the same having been previously approved of by the lord high admiral or the Commissioners for executing the office of lord high admiral, such approval to be from time to time signified in writing under the hand of the secretary to the admiralty." The works in question were constructed after the passing of that Act, and no consent of the admiralty was first obtained. The 28th section enacts, that, "in order to preserve the navigation of the river Thames, the plans of any work to be constructed under the authority of that Act upon the banks, bed, or shore of the river Thames, which may interfere with the free navigation of the said river, shall be approved by the conservators of the river Thames, in writing signed by their secretary, before such works are commenced, certifying that the works according to such plans will not interfere with the navigation of the river Thames." The thing complained of, therefore, is an obstruction in a public highway contrary to the express prohibition of a statute, and therefore, on the authority of The Queen *v.* Scott, 3 Q. B. 543 (E. C. L. R. vol. 43), 2 Gale & D. 729, an indictable misdemeanor. The *780] Board here, as the railway Company did *there, have, as Lord Denman said, "done what the Act legalizes only on a condition which they have not performed." Every person concerned in the construction of the work is responsible for it. It is said that the Board are trustees or public officers acting gratuitously, and therefore are not personally responsible for their acts or the acts of those acting under them. No case, however, has gone beyond this, that persons intrusted with the performance of a public duty, discharging it gratuitously, and being personally guilty of no negligence or default, are not responsible for an injury sustained by an individual through

the negligence of workmen employed under them: see Ellis *v.* The Sheffield Gas-Consumers Company, 2 Ellis & B. 767 (E. C. L. R. vol. 75); The Southampton and Itchin Floating-Bridge Company *v.* The Southampton Board of Health, 8 Ellis & B. 801 (E. C. L. R. vol. 92); Ruck *v.* Williams, 3 Hurlst. & N. 308.† In Hole *v.* The Sittingbourne and Sheerness Railway Company, 6 Hurlst. & N. 488,† the defendants, a railway Company, were authorized by their Act of Parliament to construct a railway bridge across a navigable river: the Act provided that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals, or passengers, ready to traverse, to cross the bridge, and for opening it to admit such vessel: the defendants employed a contractor to construct the bridge in conformity with the provisions of the Act of Parliament, but, before the works were completed, the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river: the Court of Exchequer held that the defendants were liable for the damage thereby caused to the plaintiff. Pollock, C. B., there says: "This is a case in which the maxim 'Qui facit per alium facit per se' applies. Where a person is authorized by Act of Parliament or *bound by contract to do particular work, he cannot avoid [*781
responsibility by contracting with another person to do that work." [WILLES, J.—All the authorities on this subject were discussed recently in this Court in the cases of Whitehouse *v.* Fellowes, 10 C. B. N. S. 765 (E. C. L. R. vol. 100), and Holliday *v.* St. Leonards, Shoreditch, 11 C. B. N. S. 192 (E. C. L. R. vol. 103).] The law upon the subject both here and in Scotland is very elaborately considered by Lord Cottenham, C., in Duncan *v.* Findlater, 6 Clark & F. 894. Then it is said that the acts complained of were the acts of the contractor employed by the Board. All the evidence, however, negatived that. The piles were driven where the Board ordered them to be placed: and all the work was done according to the plans furnished by their engineers, and its construction superintended and approved of by them. The third point of the rule is disposed of by the observations already made. And, as to the fourth point, that is disposed of by the finding of the jury that there was no negligence on the part of the pilot. The second count is supported by the evidence, notwithstanding the answer given by the jury to the fourth question which was put to them. [WILLIAMS, J.—The substance of the complaint in the second count was, that no intimation was given of the presence of the piles. But the pilot stated, that, by reason of the injury sustained by his steering apparatus, the vessel became unmanageable, and he was obliged to let her take the ground. It is clear, therefore, that all the indications in the world would not have enabled him to keep clear of the obstruction. WILLES, J.—If the construction of the works at the particular spot and in the particular manner was rightful, it would probably have been the duty of the Thames conservators to take the necessary precautions: but, if it were wrongful, that duty would devolve upon the Board of Works, or upon Aird, the contractor.] The Board as well as *Aird clearly were guilty of an illegal act; [*782
and there is nothing in either of the statutes to absolve them from liability.

M. Chambers, Q. C., *Denman*, Q. C., and *Raymond*, in support of the rule obtained by the Board.—The Metropolitan Board of Works have large powers vested in them, not only under the recent statutes, but also with reference to the general scheme of legislation respecting the sewerage of the metropolis: and what they did on the occasion complained of was not only justified, but absolutely necessary, and that without any reference to the admiralty jurisdiction. The 135th section of the 18 & 19 Vict. c. 120 vests in the Board the existing sewers (of which, as appears from Schedule D. there referred to, there are no less than seventy-one having outlets into the Thames), and empowers them to alter these and construct others as they may think fit. The 54th section of the Thames Conservancy Act, 1857, enacts that it shall not be lawful for any person whomsoever to erect, build, or make any embankment, or any erection, building, or works in or upon the bed or shore of the river Thames, or to drive any piles thereon or in the said river, without the permission of the conservators. That permission the Board obtained. The 167th section of the same Act contains a saving of the rights of the Board "with reference to the construction and maintenance of sewers, and any other works for the sewerage, drainage, or improvement of the metropolis." The 166th section contains a similar protection of the rights of the old Commissioners of Sewers, in place of whom the Metropolitan Board of Works now stands. The extensive powers of these Commissioners will appear from a reference to the 11 & 12 Vict. c. 112. The 21 & 22 Vict. c. 104 is relied on as limiting the powers of the Board. The object of
*783] that statute was, to prevent as far as *practicable the sewerage of the metropolis from passing into the Thames within the metropolis; and for that purpose it authorizes the raising of very large funds for the carrying out an extensive system of drainage,—still, however, contemplating that until those works are completed the sewerage of the metropolis shall continue to flow into the river: and s. 2 expressly empowers the Board, for the purposes of the Act, to construct any work "through, along, over, or under the bed and soil and banks and shores of the river Thames, making compensation to all persons having any interest in any wharfs, jetties, or other property damaged by such works, as provided by the 18 & 19 Vict. c. 120, in respect of property injured under the powers of such Act." The 27th section of the 21 & 22 Vict. c. 104, is relied on for the purpose of showing that the works in question could not lawfully be constructed without the approval of the admiralty. That section, however, plainly has reference only to main drainage works which might so interfere with the navigation of the river as to impede the military or naval defence of the kingdom, and not to the mere improvement in the outfall of an old sewer between high and low water mark; otherwise, there would scarcely have been any necessity for the 28th section. Assuming that the permission of the admiralty ought to have been obtained, does the failure to perform that collateral duty render the whole of the works illegal? Is a mere mistake, there being no suggestion that they have acted otherwise than bonâ fide, to be treated as misconduct such as to render a gratuitous public body responsible? By the 3 & 4 W. 4. c. cxiii., "an Act for better preserving the harbour of Maryport," &c., certain trustees were

appointed for carrying out the Act. The trustees acted gratuitously; the property in the harbour was vested in them, and they were empowered to elect a harbor *master and other officers and [*784 servants connected with the harbour, with power also to discharge them. The harbour master was intrusted with the duty of directing the situation in which a vessel entering the harbour was to be moored. The trustees were also empowered to make by-laws as to the management of the harbour, and to impose tonnage-rates upon vessels using it, and to borrow money on such rates, and to apply the proceeds in payment of the interest of the money borrowed, and of the costs and expenses attending the carrying into execution the purposes of the Act connected with the harbour, and also in the reduction of the capital borrowed. It was held in Metcalfe *v.* Hetherington, 11 Exch. 257,† that the trustees were not liable, either,—first, for the acts of the harbour master in directing a vessel to be moored in an improper place, whereby it received damage,—or, secondly, for an injury occasioned to a vessel by an accumulation of rubbish in the harbour. [WILLIAMS, J.—That case is certainly inconsistent with Gibbs *v.* The Trustees of the Liverpool Docks, 3 Hurlst. & N. 164.†(*a*)] The fact of the defendants' work causing *some* possible obstruction to the navigation did not necessarily constitute them an indictable nuisance. In The Queen *v.* Betts, 16 Q. B. 1022 (E. C. L. R. vol. 71), Lord Campbell says: "I can very well conceive that a bridge may be so built in a navigable river as to be no obstruction." The Queen *v.* Scott, 3 Q. B. 543 (E. C. L. R. vol. 43), 2 Gale & D. 729, is a totally different case on principle. Here was no interference with the navigation of the river, in the sense which would make that case applicable.

Hawkins, Q. C., *Mellish*, Q. C., and *Horace Lloyd* *were heard [*785 in support of the defendant Aird's rule. They submitted that at all events the verdict should be entered for the defendants on the second count.

ERLE, C. J.—These were rules obtained by the defendants, the Metropolitan Board of Works, and John Aird, a contractor employed by them, calling upon the plaintiffs to show cause why the verdict found for them on the trial of this cause should not be set aside, and instead thereof a verdict be entered for the defendants on various grounds stated in the rules. I am of opinion that those rules should be discharged, the plaintiffs undertaking to confine the verdict found for them to the first count of the declaration, and consenting that the verdict be entered for the defendants on the pleas of not guilty to the second count. The complaint in the first count is, that the defendants wrongfully placed in a certain common navigable river and highway, to wit, the river Thames, certain piles and pieces of timber and works, and wrongfully kept and continued the same therein, and thereby greatly obstructed the due and proper navigation of the said river, by reason whereof the plaintiffs' ship, then lawfully navigating the said river, ran and struck upon the said piles, pieces of timber, and works, and was by reason thereof greatly injured. It is clear that

(*a*) Willes, J., in Whitehouse *v.* Fellowes, 10 C. B. N. S. 777 (E C. L. R. vol 100), observes, that "Metcalfe *v.* Hetherington received a fatal blow in Gibbs *v.* The Trustees of the Liverpool Docks."

these piles were so driven into the bed of the river as to cause a dangerous obstruction to the navigation; and the damage which was done to the plaintiffs' ship shows that they caused great danger to the public, and that the placing them there might be an indictable offence, as well as the subject-matter of an action for particular damage. That part of the plaintiffs' case, therefore, is sustained: and the only question is, whether any of the statutes which have been referred to justify
*786] the acts done by the defendants. The general *powers of the Commissioners of Sewers for the city of London and of the Metropolitan Commissioners of Sewers were by the 18 & 19 Vict. c. 120, transferred to a new body incorporated under the name of the Metropolitan Board of Works. The 135th section of the Act vests all the existing sewers in this new board, and gives them very extensive powers to "make such sewers and works as they may think necessary for preventing all or any part of the sewerage within the metropolis from flowing or passing into the river Thames in or near the metropolis," and also to "make such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under this Act, as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis," and "shall from time to time repair and maintain the sewers so vested in them," &c.; "and, for the purposes aforesaid, such Board shall have full power and authority to carry any such sewers or works through, across, or under any turnpike-road, or any street, or place laid out as or intended for a street, as well beyond as within the limits of the metropolis, or through or under any cellar or vault under the carriage-way or pavement of any street, and into, through, or under any lands whatsoever within or beyond the said limits, making compensation for any damage done thereby," &c. If it were necessary, I should come to the conclusion that the legislature did not intend to give power to the Metropolitan Board to carry their works into the river Thames so as in any degree to obstruct the free navigation thereof. It is not necessary, however, for the judgment I am about to pronounce that I should offer any opinion upon that: but I cannot help observing that the legislature, having in s. 135 specified several places through, across, or under which the Board may carry their works,
*787] have *cautiously abstained from mentioning the bed or soil of the river. And I think the statutes which were passed afterwards recognise that view. Why should the legislature give the Board power by the 2d section of the 21 & 22 Vict. c. 104 to "construct any work through, along, over, or under the bed and soil and banks and shores of the river Thames," if they already possessed the general power which has been contended for? If I am right in this conclusion, the defendants have clearly been guilty of a violation of the law. Supposing, however, that argument not to be tenable, and that the 135th section of the 18 & 19 Vict. c. 120 gave the Board power to do as they have done, still I am of opinion that that power must be restrained by the provisions of the amending Act of 21 & 22 Vict. c. 104, the 33d section of which declares that the two Acts shall be read together as one Act—constituting one code of law in relation to the subject-matter in hand. Taking these two statutes together then, do they afford the defendants any justification for that which

they have done? The 2d section of this latter Act, as I have already observed, expressly empowers the Board, for the purposes of that Act, to "construct any work through, along, over, or under the soil and banks and shores of the river Thames, making compensation to all persons having any interest in any wharfs, jetties, or other property damaged by such works, as provided by the 18 & 19 Vict. c. 120, in respect of property injured under the powers of such Act." This, if there were nothing more in the Act, would unquestionably have warranted the defendants in constructing the work in question: but the 27th section contains an express prohibition against the erection of any work which may interfere with the navigation, except on performance of a condition precedent,—*"No works upon the [*788 bed or shores of the said river Thames below high-water mark which may interfere with the navigation of that river shall at any time be commenced or executed under the provisions of this Act without the same having been previously approved of by the Lord High Admiral, or the Commissioners," &c. The approval of the admiralty of the works in question has not been obtained. The condition precedent, therefore, has not been performed, and consequently the defendants are without justification under this statute. The legislature seem to have contemplated the power and control of the admiralty as being essential to the keeping clear and uninterrupted the navigation of the Thames; for, though the 54th section of the Thames Conservancy Act, 20 & 21 Vict. c. cxlvii., provides that "it shall not be lawful for any person whomsoever to erect, build, or make any embankment, or any erection, building, or work in or upon the bed or shore of the river Thames, or to drive any piles thereon or in the said river, *without the permission of the conservators*," that statute does not contemplate that the conservators shall be the sole parties to give such permission. The 105th section enacts that "no works upon the bed or shores of the said river Thames below high-water mark shall at any time be commenced or executed under the direction or with the sanction or permission of the conservators without the same having been previously approved of by the Lord High Admiral or the Commissioners for executing the office of Lord High Admiral, such approval to be from time to time signified in writing under the hand of the secretary to the admiralty; or, if such approval be not previously obtained, without proper conditions being made to provide for the immediate removal of all such works, upon notice from the admiralty, under the hand of the secretary, requiring the *same [*789 to be removed." The justification under the authority of the conservators therefore fails: they could not give any valid authority without the concurrence of the admiralty. The result is that the defendants have been guilty of a wrongful act, and they show no justification.

WILLIAMS, J.—I am entirely of the same opinion, and for the reasons assigned by my Lord. I agree that the rule should be discharged, upon the terms of the verdict being entered for the defendants on the second count. It is clear from the evidence of the Trinity House pilot who had charge of the plaintiffs' vessel, that, as soon as by reason of the vessel striking against the mooring-chains her rudder machinery became powerless, the vessel became helpless, and the only

thing left was to allow her to ground on the exact spot she did, even though those in charge of her were perfectly aware that the piles were there. Assuming, then, that it was the duty of the defendants to give notice of the obstruction, the neglect to perform that duty was not the cause of this accident. One argument that has been urged on the part of the defendants, is, that the piles did not interfere with the free navigation of the river, and that the plaintiffs' vessel was not navigating the river in due course. It may be that it is unusual for vessels to go along that part of the river. But this vessel was taken there by circumstances. Besides, ships may take the ground in the river Thames with perfect safety: and it is perfectly clear, that, if it had not been for these piles, the Zebra might have grounded on the spot in question without sustaining any damage. Is a vessel to be deprived of that advantage by placing rocks or other dangerous obstructions upon the hard? It was abundantly proved that the plaintiffs' vessel *790] was by the *acts of the defendants prevented from being navigated as they were entitled to navigate it. Upon all the other points I entirely agree with what has fallen from my Lord.

WILLES, J.—I am of the same opinion. The second count is disposed of by the remarks already made. The first count is founded upon an injury sustained by the plaintiffs in consequence of an obstruction placed by the defendants in the bed of the river. I think both the Board of Works and the contractor are liable upon that count, if the obstruction complained of was an unlawful act. The proper way of dealing with this question, is, to put the two Acts,—18 & 19 Vict. c. 120, and 21 & 22 Vict. c. 104,—together, and to treat the 135th section of the former as if it were found in an Act of which the 2d section of the latter formed one of the sections. There would then be a general clause giving the Board power to construct their works in all places within the limits of the metropolis, and then a special clause dealing with works to be done in the bed or soil of the river Thames: and, of course, in considering what are the powers conferred upon the Board with respect to works to be done in the bed of the river, regard must be had to the special clause only, and not to the general provision. Now, the powers conferred by the special clause, the 2d section of the 21 & 22 Vict. c. 104, are to be exercised only subject to the condition contained in the 27th section of the same Act, viz., that they shall be previously approved of by the lord high admiral or the commissioners of the admiralty. As that condition was not complied with here, it stands that the Board of Works have placed an unauthorized obstruction in a public navigable river, which is a public nuisance, and consequently that they are liable to the *791] plaintiffs for *the particular damage which they were proved to have sustained thereby.

KEATING, J.—I entirely agree in the construction which my Lord and my two learned Brothers have put upon the Acts of Parliament referred to. Rule discharged.

TOBIN and Another *v.* HARFORD. *Feb.* 5.

A policy was effected for twelve months on ship and goods from Liverpool to the coast of Africa and back, on a barter-voyage. The policy contained a stipulation that "outward cargo should be considered homeward interest twenty-four hours after arrival at first port or place of trade:" and by a memorandum the insurance was stated to be "upon ship valued at 2000*l.*, and cargo 8000*l.*, with liberty to increase the valuation of the homeward cargo." The ship sailed to Kinsembo, on the African coast, and there discharged a third of her cargo, and, after a stay there of more than twenty-four hours, proceeded towards other ports in order to take in homeward cargo, and was totally lost, together with the two-thirds of the outward cargo which remained on board:—

Held, that the valuation applied to what was substantially a *full cargo*, and not to any quantity of goods substantially less than a full cargo, and entitled the assured to 8000*l.* in the event of the total loss of a substantially full cargo, or to an indemnity in case of any partial loss, not in any case exceeding 8000*l.*; and that the principle for the valuation of a partial loss was this,—If the value of the whole of the intended cargo was a datum, the partial loss would be adjusted to the common proportion; but, where the value of the whole of the intended cargo could not be ascertained, the proportion which the part lost bore to the whole could not be known, and the mode of estimating a partial loss under a valued policy could not be adopted; and, consequently, that, under the circumstances, the assured would be entitled to the ordinary indemnity as under an open policy underwritten for 8000*l.*

THIS was an action for a total loss upon a policy of insurance for twelve months, commencing on the day of the vessel's leaving the dock at Liverpool, in port or at sea, in all places, at all times, and in all services, including the risk of craft, boats, and cranes, to and from the vessel, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, and furniture, &c., of the good ship called the Shark, and so to continue and endure during her abode at Liverpool, and further until the ship had moored at anchor twenty-four hours in good safety, and upon the *goods and merchandises until the same be there discharged and safely landed: And it [*792 was to be lawful for the ship to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, with leave to discharge, load, unload, reload, sell, barter, exchange, and trade all or either goods and property upon the coast of Africa and African islands, and with any vessel or vessels, boat or boats, factories, and canoes, in port and at sea, and to transfer interest from this to any other vessel or vessels, and from any other vessel or vessels to this vessel, all or any the risk to continue by the Shark and boats as above only, in port and at sea, and at any ports and places she might call at or proceed to, without being deemed any deviation, without prejudice to that insurance: And it was agreed that the vessel might be towed or otherwise assisted by steam-vessels or any other vessels during the voyage; and *outward cargo to be considered homeward interest twenty-four hours after arrival at first port or place of trade.* The policy was declared to be on the ship valued at 2000*l.*, and on the cargo valued at 8000*l.*, with liberty to extend the valuation of the homeward cargo, and with liberty for the ship to move from dock. By a subsequent clause, it was agreed to continue the risk on the Shark, at the same rate of premium, until her arrival back, on the same conditions.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term. The admitted facts were as follows:—

The Shark sailed in due course from Liverpool to the coast of

Africa, with a cargo of the value of 6226*l.* 5*s.* 10*d.* She arrived at Kinsembo on the 14th of August, and there landed a portion of her cargo the invoice value of which was 2952*l.* 8*s.* 3*d.* This portion of
*793] the cargo was landed on the 15th, 16th, and 17th *of August. On the night of the 17th of August, the Shark sailed for the river Congo; and on the 19th she was totally lost. She took no fresh cargo on board at Kinsembo, and was proceeding to Congo for the purpose of obtaining cargo,—ivory, dye-woods, and gum,—which she would to some extent at all events have succeeded in doing had she arrived there.

The defendant (who had underwritten for 100*l.*) had paid 20*l.* as for a total loss of the ship; and he paid 43*l.* into court as for a total loss of part of the cargo. This sum of 43*l.* was calculated in this way:—The invoice value of the cargo on board the vessel at the time of her loss was 3273*l.* 17*s.* 7*d.*, being the difference between the full cargo, 6226*l.* 5*s.* 10*d.*, and the value of the goods taken out at Kinsembo, viz. 2952*l.* 8*s.* 3*d.*; and this, at the value stated in the policy, would give something less than 4300*l.* as the value of that portion of the cargo which was on board at the time of the loss. For this the underwriters admitted their liability; and the defendant's proportion was the sum paid into Court.

It was contended on the part of the plaintiffs that the underwriters were liable as for a total loss of a cargo valued at 8000*l.*, without any reference to the proportion which that part of the cargo which was actually lost bore to the cargo on board when the vessel commenced her outward voyage.

A verdict was taken for the plaintiffs for 37*l.*, the difference between the sum paid into Court and the amount claimed,—leave being reserved to the defendant to move to enter a nonsuit or a verdict for him if the Court should be of opinion, upon the true construction of the policy, that he was not liable as for a total loss.

*794] *Lush*, Q. C., in Michaelmas Term last, obtained a rule *nisi accordingly. He referred to Rickman *v.* Carstairs, 5 B. & Ad. 651. That was a valued policy of insurance upon ship and goods at and from the coast of Africa to the ship's port of discharge in the united kingdom, with liberty to touch at all ports and places whatsoever and wheresoever, to trade backwards and forwards in any order, and to call at or proceed to the Azores, Madeira, &c., and all African islands, beginning the adventure on the goods from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of Africa, including the risk in boats in loading and unloading, with liberty to load, unload, sell, barter, or exchange with any ships or factories wheresoever she might call. And it was held that the policy did not protect an outward cargo shipped before the vessel's arrival on the coast of Africa. And, a considerable proportion of the intended homeward cargo not being shipped at the time of a total loss, and the part shipped not being equal to the value put on the goods in the policy,—it was further held that the valuation was opened, and that, although the part shipped of the homeward cargo, together with a part of the outward cargo then remaining on board, made up the amount named in such valuation, the assured could recover only a

proportion estimated on the part of the homeward cargo shipped at the time of the loss.

Bovill, Q. C., and *J. Brown*, in Hilary Term, showed cause.—The nature of the voyage on which the Shark was bound, viz. an African barter voyage, being such that the merchant has no means of knowing what quantity or description of goods may be on board at any particular time or place, and the means of communication by letter or otherwise being difficult and uncertain, the course of business in effecting insurances is *to assume a value. In Rickman *v.* Carstairs, the insurance was on the homeward cargo only. [*795 The vessel not having discharged the whole of her outward cargo, part of it remained on board when she sailed on her homeward voyage: and the question was whether the part so remaining on board could come within the description of "homeward cargo." The Court said: "In this case it is with regret that we find ourselves obliged to come to the conclusion that the plaintiffs are not entitled to recover for a total loss; because it appears very likely that the assured *intended* by this policy to insure both the outward and homeward cargo, and to have valued both, inasmuch as a great part of the outward cargo would, in such a voyage, remain on board, and would be continually varying in the course of barter, and nothing is more probable than that the entire cargo should be valued, to prevent difficulty of valuation in the case of loss. Unfortunately, however, they have used words which will not, we think, effectuate that intention." "It is very true that there will be some difficulty in making the proper calculation as to the sum to be paid, on the supposition that the subject of insurance is the homeward cargo; because, on such a voyage, it is not easy to say what the value of a full home cargo will be, nor what proportion of a full cargo is on board at the time of the loss. That difficulty occurred, and nearly to the same extent, in Forbes *v.* Aspinall, 13 East 323, though it does not seem to have been brought to the attention of the Court: but it cannot enable us to reject the words which cause the policy to attach on the homeward cargo only, and to declare that the policy was meant to include both." It was to meet the difficulty suggested in that case that the clause providing that "outward cargo should be considered homeward interest twenty-four hours after arrival at *the first port or place of trade" was introduced into this policy. The argument on the other side [*796 is, that the value here refers to a full cargo, and that, about 3000*l.* worth of the cargo having been landed before the loss happened, the underwriters are only liable to the extent of the proportion which the residue bears to a full cargo valued at 8000*l.* That clearly was not the intention of the parties. The nature of the voyage being such that it could not be foreseen what the value of the cargo on board would be at any particular time, the value is assumed to be 8000*l.* If cargo to a greater value should happen to be on board at the time of a loss happening, the assured could never recover more than that sum: so, whatever the actual value, he is not to recover less. [WILLIAMS, J.—According to your argument, if all the cargo except 100*l.* worth were discharged at the first port, and a loss happened before anything more was taken on board, the assured would be entitled to the whole 8000*l.*] Apart from fraud, it is submitted they would. The

agreed value of the cargo, such as it may be, is 8000*l.* In Shaw v. Felton, 2 East 109, it was held, that, on an insurance of ship and goods valued at 6600*l.*, on a voyage to Africa and the West Indies, the assured was entitled to recover the whole sum on a total loss which happened in the latest period of the voyage,—although a considerable part of the estimated value consisted originally of stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered. It was there contended on the part of the underwriters, that, "admitting that the vessel with her outfit was worth 6600*l.* when the insurance was made, yet, as a great proportion of that value, to the amount of above *797] *3000*l.*, consisted in those stores and provisions out of which the profit of the voyage was to arise by the expenditure of them, and as in fact the slaves who were purchased and sustained out of that expenditure all arrived safe, and produced the profit of the voyage, the subject-matter of insurance, as to so much, was not lost to the plaintiff, but arrived at the place of its destination, and had been received by him in the shape of profit upon the voyage." But Lord Kenyon said: "If we were to enter into the calculations which have been contended for, every valued policy would be to be opened. Every man's meal on board a ship would take from the value of the original outfit. Is this to be endured? Will good faith admit of it? Where is the line to be drawn between a greater or less diminution of the value? Therefore, as the rule and practice of valued policies have been acted upon and sanctioned since the passing of the statute,(a) I am not one who wish quieta movere." Lawrence, J., said: "The effect of a valued policy is, not to conclude the underwriter from showing that the assured had no interest, and that in fact it was a mere wagering policy within the statute; but, in order to avoid disputes as to the quantum of the assured's interest, the parties agree that it shall be estimated at a certain value. Here, it is not pretended that the subject-matter of the insurance was not at first of the value estimated in the policy. Then, how does this differ from the case of an open policy in this respect? Would it not be sufficient for the assured in an open policy to prove that at the time the ship sailed the subject-matter of the insurance was of such a value? Is not that the period to look to, and not the state of the thing at the time of the total loss happening? If on account of the peculiar nature of an *798] *African voyage, there ought to be a difference in this respect between these and other trading adventures, the underwriters may if they please introduce a special clause in the policy to provide for the diminution in value by the expenditure of stores and provisions in the purchase and sustaining of the slaves." And Le Blanc, J., added: "The value of the property must be continually diminishing, and, if the loss happen at the latter end of a long voyage, no doubt the property must be considerably deteriorated at the time by the usual wear and tear; and yet it is never objected that the underwriter is not liable for the original value." A similar doctrine was laid down by Lord Ellenborough in Hill v. Patten, 8 East 373. In Arnould on Insurance, 2d edit., p. 357 (§ 133), it is said: "The differ-

(a) 19 G. 2, c. 37.

ence, in point of effect, between a valued and an open policy, is, that, under an open policy, in case of loss, the assured must prove *the actual value of the subject of insurance;* under a valued policy he need never do so, except in cases of *enormous* or *fraudulent* overvaluation: except in such cases, the valuation in the policy is conclusive, and the case is the same as though the subject of insurance was actually proved to have been worth the sum at which it is valued." Again, p. 361, "In cases of *total* loss, the value in the policy has always been held as the conclusive *standard of indemnity*,"—citing Shaw *v.* Felton, 2 East 109. The case of Forbes *v.* Aspinall, 13 East 323, illustrates that which will be contended for on the other side. There, freight valued at 6500*l.* was insured on a ship from any port or ports in Hayti to Liverpool; and the ship, which had sailed with goods from Liverpool to Hayti on a voyage of barter, after exchanging a part of her outward cargo for fifty-five bales of cotton at one port of Hayti, proceeded with the same to another port, for the purpose of making a similar barter of the rest of *the outward cargo, but was lost by a peril of the sea before it was effected: and it was held that the assured [*799 was only entitled to recover for the freight of the fifty-five bales of the return cargo on board, though there was a moral certainty at the time that the remaining part of her outward cargo would, except for the loss, have been exchanged for a full return cargo. That question is whether that principle is applicable to a policy effected on a voyage in this particular trade, where the cargo is always shifting as the vessel proceeds from port to port, so that it is not possible to ascertain beforehand the nature and value of the goods shipped at the different ports.

Lush, Q. C., *Mellish*, Q. C., and *Honyman*, in support of the rule.—The question turns upon the construction of the words in the policy "cargo valued at 8000*l.*" If the whole of that subject-matter was lost, the underwriters must pay the whole: if a part only, they are liable only for that part. The rule is well stated in 1 Arnould on Insurance, p. 365 (§ 134),—"The parties are only bound by the valuation *as far as it goes;* and if only part of the interest to which the valuation in the policy refers has ever been at risk on board, the assured, in case of loss, can only recover upon a proportionate amount of the valuation. The rule is, that the underwriter is bound by the valuation on the freight and goods only where all the cargo which was the subject of the contract is on *board* at the time of loss. For instance, if goods, the prime cost of which, including premiums and commission, would be 4500*l.*, are valued in the policy at 5000*l.*, and it should turn out that of these goods only two-thirds, or 3000*l.* worth, were ever really shipped on board, the assured, in case of loss, would only recover the same proportion of 5000*l.*, the sum valued, that 3000*l.* is of 4500*l.*, *i. e.*, *two-thirds, or 3999*l.* 6*s.* 8*d.*" In [*800 Forbes *v.* Aspinall, 13 East 326, Lord Ellenborough says: "The object of valuation in a policy is, to fix by agreement between the parties an estimate *upon the subject insured*, and to supersede the necessity of proving the actual value, by specifying a certain sum as the amount of that value. The valuation, in the case of goods, looks to *all the goods* intended to be loaded; and, in the case of freight, it looks to *freight upon all the goods* the ship is intended to carry upon

the voyage insured: and if by the perils insured against in a valued policy on goods, *part* only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of *that part:* and so, if by the perils insured against the *freight* of *part only* of the goods to be carried be lost, the assured can only recover in respect of that loss, according to the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation." The contention on the part of the assured is, that "cargo" means the cargo, be it more or less, that happens to be on board at the time of the loss. According to that construction, if the whole outward cargo had been discharged at the first port of barter except a single African musket, and the ship was lost while going to another port or island to take in her homeward cargo, that musket is by agreement of the parties to be considered worth 8000*l.* That would be contrary to the principle of all marine insurance, which is a contract of indemnity. The *whole* outward cargo is valued at 8000*l.*: and the *whole* homeward cargo is valued at 8000*l.*, unless the assured choose to take advantage of the clause empowering them to increase the valuation. The words "outward cargo to be considered homeward interest twenty-four hours after arrival at first port or place of trade," were first inserted in a voyage policy: *in truth they have no application to a time policy. [WILLES, J.—The only object of the insertion of those words, was, to prevent the underwriter from saying that there was neither a full outward nor a full homeward cargo on board.] The true construction of this policy probably is, that it is a valued policy on the voyage out and home, and an open policy (to the extent of 8000*l.*) whilst going from place to place on the African coast. This construction would give the assured a full indemnity for his actual loss; whereas, any other would give him something far beyond an indemnity: and the Court will not without some imperative necessity put so unreasonable a construction upon the contract. No light is thrown upon the matter by the case of Shawe *v.* Felton, 2 East 109. That was an insurance on ship and outfit (including provisions and sea-stores laid in for the slaves intended to be purchased and shipped: and it might reasonably be said that it could not have been the intention of the parties to enter into a consideration as to how much of the stores had been consumed at the time of the happening of the loss. *Cur. adv. vult.*

*801]

WILLIAMS, J., now delivered the judgment of the Court:(*a*)—

In this case a ship sailed to Kinsembo, in Africa, and discharged one-third of her cargo, and, after a stay of more than twenty-four hours, proceeded towards other ports, in order to take in homeward cargo, and was totally lost, together with the two-thirds of the outward cargo that remained on board.

The plaintiffs had a time policy for twelve months on ship and goods, in the common form. It contained all *the clauses said to be adapted to a barter trade on the coast of Africa, and also a stipulation that "outward cargo should be considered homeward interest twenty-four hours after arrival at first port or place of trade:" and by a memorandum the policy was stated to be "upon ship valued at 2000*l.*, cargo 8000*l.*, with liberty to increase the valuation of the homeward cargo."

*802]

(*a*) The case was argued before Erle, C. J., Williams, J., Willes, J., and Keating, J.

Upon these facts, the plaintiffs claimed 8000*l.* for a total loss of the subject valued at that sum under the name of "cargo." We are to say whether he is entitled thereto; and, if not, whether the loss is to be estimated either by reference thereto as a partial loss under a valued policy, or by reference to the value of the goods, not exceeding 8000*l.*, under an open policy.

The plaintiffs argued that the parties intended to provide for the great variations in value incidental to African cargoes, and to the absence of means of regular communication with that coast by letter or otherwise; and that, as the policy was for time, and not for a voyage, it would not necessarily be confined to outward and homeward cargoes; and that the subject described by the words "cargo valued at 8000*l.*," ought to be construed to mean any merchandise which should be on board at the time of the loss.

But we are of opinion that this is not the true construction, and that the valuation applies to what is substantially a full cargo, and not to any quantity of goods substantially less than a full cargo. It is clear that the policy covers the merchandise on board in all or any of the ship's movements, and throughout every variation of loading, unloading, or transhipping, and entitles the assured to 8000*l.* in the event of the total loss of a substantially full cargo, or to an indemnity in case of any partial loss, not in any case exceeding 8000*l.* But the plaintiffs' claim is to more than indemnity, viz. to the value named for the whole cargo, *though only a part of a cargo was lost, and all the rest was landed in safety: and we do not find this intention expressed in the words of the policy. [*803

Then, as to the principle for valuation of a partial loss,—If the value of the whole of the intended cargo was a datum, the partial loss would be adjusted by the common proportion; but, where the value of the whole of the intended cargo cannot be ascertained, the proportion which the part lost bears to that whole cannot be known, and the mode of estimating a partial loss under a valued policy cannot be adopted.

Under these circumstances, we think that the assured would be entitled to the ordinary indemnity as under an open policy underwritten for 8000*l.*

The point decided in this judgment was mentioned in Rickman *v.* Carstairs, 5 B. & Ad. 651, both by the counsel in argument, and by Mr. Justice Parke, but was not then decided, because a new trial was granted. The point is also mentioned in Arnould on Insurance, § 134.

On these grounds, we think the rule should be made absolute as above directed. Rule accordingly.

END OF HILARY TERM.

MEMORANDUM.

ON the fifth day of Hilary Term, John Osborne, Esq., and James St. George Burke, Esq., both of the Middle Temple, having been appointed Her Majesty's Counsel learned in the Law, were called within the Bar.

IN THE EXCHEQUER CHAMBER.

*805] *GRUBB *v.* THE ENCLOSURE COMMISSIONERS FOR ENGLAND AND WALES.

Held,—affirming the judgment of the Court of Common Pleas,—that it is competent to the enclosure commissioners, under the 8 & 9 Vict. c. 118, to order the valuer to set a private or occupation road over land directed by the provisional order to be allotted to an individual in lieu of his rights in the lands to be enclosed, unless the provisional order expressly declares that his allotment shall be exempt from such a burthen.

UPON a motion to set aside a writ of prohibition issued out of the petty-bag office, prohibiting the enclosure commissioners from confirming an award about to be made by them in the matter of an enclosure of lands at Hughenden, in the county of Bucks, the Court held,—9 C. B. N. S. 612 (E. C. L. R. vol. 99),—that it was competent to the commissioners, under the 8 & 9 Vict. c. 118, to order the valuer to set out a private or occupation road over land directed by the provisional order to be allotted to an individual in lieu of his rights in the lands to be enclosed, unless the provisional order expressly declares that his allotment shall be exempt from such a burthen; but they allowed the applicant to declare in prohibition.

The declaration stated, that, before and at the time of the making of the provisional order thereinafter mentioned, Edward Grubb was seised in fee simple in possession of certain lands situate in the parish of Hughenden, in the county of Buckingham, and by a provisional order of the enclosure commissioners for England and Wales, sealed with their official seal, and bearing date the 5th of June, 1856,—reciting, amongst other things, that persons interested in certain lands therein described, situate in the parish of Hughenden, in the county of Buckingham (and amongst which are the said lands of which the said Edward Grubb was so seised as aforesaid), being land subject to
*806] be enclosed under the provisions of "The Act for the enclosure, *exchange, and improvement of land" (8 & 9 Vict. c. 118, and 11 & 12 Vict. c. 99), and proposing to enclose the same under the said Acts, had made due application to the enclosure commissioners for England and Wales to sanction such enclosure; and that they the said commissioners were of opinion that the said proposed enclosure would be expedient, and, in case the requisite consent should be given, and the requisites of the said Acts be otherwise complied with, intended to certify in their annual general report the expediency of such enclosure, upon the terms thereinafter mentioned,—the said commissioners, in pursuance of the power given to them by the said Acts, did declare the following (amongst others) to be the terms and conditions on which they were of opinion that the said proposed enclosure should be made, that is to say, That Piggott's Common and part of Spring Coppice, containing together 27*a.* 3*r.* 30*p.*, High Coppice, 21*a.* 26*p.*, North Dean Bottom, 3*a.* 3*r.* 27*p.*, Willow Coppice, 20*a.* 3*r.* 34*p.*, Driftway, 2*a.* 2*r.* 21*p.*, and Spring Coppice, 63*a.* 4*p.*, and which were part of the said lands of which the said Edward Grubb was so seised

as aforesaid, together with all wood and underwood then growing on such tracts and on all other tracts proposed to be enclosed, except Naphill Common, Greenhill, and the Common Fields, should be allotted to the said Edward Grubb in lieu of his right and interest in the lands to be enclosed; That Chapel Hill, Bryant's Bottom, Denner Hill Coppice, Bottom of Widenton Hill, and Denner Hill Common, containing together 69*a.* 1*r.* 8*p.*, and which were the remaining part of the said lands of which the said Edward Grubb was so seised as aforesaid, should be allotted as follows, that is to say, that an allotment equal in value to one seventh part thereof after deducting an allotment of 2*a.* for the labouring poor, and the allotments (if any) *for defraying the expenses of the enclosure, should be made to the [*807 Right Hon. Benjamin Disraeli in lieu of his right and interest in the soil of the said tracts, and in all substrata under the same; and that the residue of the said tracts should be allotted amongst the commoners in proportion to their respective common rights: That the said commissioners duly caused to be deposited for inspection a copy of the said provisional order in the said parish of Hughenden, and the necessary consents required by the said Acts were given, and the requisites of the said Acts otherwise complied with; and that the said Edward Grubb was one of the persons consenting to the said enclosure, and, before the said provisional order was deposited for inspection as aforesaid, and previously to the said Edward Grubb consenting to the said enclosure, the said Edward Grubb and the several persons having rights of common or other interests in the said lands proposed to be enclosed, and of which he was so seised as aforesaid, agreed, subject to the consent and approval of the said commissioners, that the said several lands called Piggott's Common, and part of Spring Coppice, High Coppice, North Dean Bottom, Willow Coppice, Driftway, and Spring Coppice, should be allotted to him, and in consideration thereof, that he should give up the same several lands called Chapel Hill, Bryant's Bottom, Denner Hill Coppice, Bottom of Widenton Hill, and Denner Hill Common, to be allotted amongst the said Benjamin Disraeli and the commoners: That the name "Hughenden, Bucks," is mentioned in the schedule to "The Second Annual Enclosure Act, 1856;" and by the same Act it is enacted that the several enclosures mentioned in the said schedule should be proceeded with; and that, after the passing of the said Act, William Brown was duly appointed the valuer in the said enclosure, and accepted the said appointment, and, after the usual proceedings in the said enclosure, duly *drew up and signed and sent to the office of the said [*808 commissioners his report in writing in the matters of the said enclosure, and since so sending his said report the said William Brown, as such valuer, and acting in the matter of the said enclosure, has, under the direction of the said commissioners, set out a certain private or occupation road over Piggott's Common aforesaid, for the use of the persons interested in certain land part of the said land proposed to be enclosed and allotted to Roger Williams, but now belonging to Edward Griffin, and is, under the direction of the said commissioners, about to cause to be drawn up and engrossed on parchment the award in the matter of the said enclosure, and to set out in the said award the said private or occupation road over Piggott's Common

aforesaid, for the use of the said persons interested in the said land: Wherefore the plaintiff prayed the judgment of this Court that a writ of prohibition might issue out of this Court to prohibit the said commissioners from confirming the said award when so drawn up and engrossed as aforesaid, and setting out therein the said private or occupation road over Piggott's Common aforesaid.

The defendants pleaded, that Piggott's Common in the declaration mentioned, before and at the time of the making of the said provisional order in the declaration mentioned, was woodland subject to rights of common of pasture for cattle levant and couchant, and land subject to be enclosed under the said Acts in the declaration mentioned; that the provisional order in the declaration mentioned, after the recitals in the declaration mentioned, proceeded in the words and figures following, that is to say, "Now, therefore, in pursuance of the power given to us by the said Acts, we, the Enclosure Commissioners for England and Wales, do by this provisional order under our seal declare the following to be the terms and conditions on which we *809] *are of opinion that the said proposed enclosure should be made, that is to say, that three acres at or near the spot marked A. on the plan hereunto annexed be allotted for the purposes of exercise and recreation; that two acres at or near the spot marked B., two acres at or near the spot marked C., and two acres at or near the spot marked D. on the said plan, be allotted for the labouring poor; that Piggott's Common, and part of Spring Coppice, containing together 27*a.* 3*r.* 30*p.*, High Coppice, 21*a.* 0*r.* 26*p.*, North Dean Bottom, 3*a.* 3*r.* 27*p.*, Willow Coppice, 20*a.* 3*r.* 4*p.*, Driftway, 2*a.* 2*r.* 21*p.*, and Spring Coppice, 63*a.* 0*r.* 4*p.*, together with all wood and underwood now growing on such tracts and on all other tracts proposed to be enclosed except Naphill Common, Greenhill, and the Common Fields, be allotted to Edward Grubb, Esq., in lieu of his right and interest in the lands to be enclosed; that Chapel Hill, Bryant's Bottom, Denner Hill Coppice, Bottom of Widdenton Hill, and Denner Hill Common, containing together 69*a.* 1*r.* 8*p.*, be allotted as follows, that is to say, that an allotment equal in value to one seventh part thereof after deducting the allotment of two acres for the labouring poor, and the allotments (if any) for defraying the expenses of the enclosure, be made to the Right Hon. Benjamin Disraeli, in lieu of his right and interest in the soil of the said tracts and in all substrata under the same, and that the residue of the said tracts be allotted among the commoners in proportion to their respective common rights; that the allotment to be made to the said Benjamin Disraeli as aforesaid be set out upon the common nearest to his property at Naphill; that an allotment of one sixteenth part in value of Naphill Common and of Greenhill, or of so much thereof as is waste of the manor of Hughendon, be made to the said Benjamin Disraeli in lieu of his right and interest in the *810] soil of such waste and in all *substrata under the same; that, in regard to such portions, if any, of the said Naphill Common and Greenhill as are not waste of the manor of Hughendon, an allotment of one sixteenth part in value thereof be made to the owner or respective owners of the soil of such portions, in lieu of their or his right and interest in the soil and in all substrata; and that the residue of the said Naphill Common and Greenhill be allotted among the

parties entitled to rights of common or pasturage thereon. In witness," &c.: Averment, that the said William Brown was appointed valuer as in the declaration mentioned at a meeting held on the 4th of September, 1856, according to the provisions of the 33d section of the General Enclosure Act, 1845, and that the plaintiff was present and took part in the said meeting, and that at the said meeting instructions to the said valuer were resolved upon according to the 34th section of the said last-mentioned Act, and the said instructions were in the words and figures following, that is to say,—"No. 1. That Mr. William Brown, of Tring, land-surveyor, be appointed the valuer in the matter of the said enclosure, to perform all the duties of valuer and surveyor according to the provisions of the Acts for the enclosure, exchange, and improvement of land,—2. That the said William Brown shall furnish the two copies of the map required to be annexed to the copies of the award, embracing all the waste or common lands and common field lands to be enclosed or allotted within the manor of Hughendon,—3. That the said William Brown shall also, if required so to do by the Enclosure Commissioners, furnish two copies of that portion of the tithe-commutation plan of the said parish of Hughendon which will describe the lands in right of which allotments have to be made,—4. That the said William Brown shall pay and discharge the costs of all notices and advertisements connected with the *stopping up roads, opening new roads, advertisements, calling meetings, and of all other matters required by the Act to be [*811 inserted by him (meetings called by the Commissioner excepted),—5. That the said William Brown be paid 9*s.* per acre for each acre of waste or common field lands so to be allotted, for the duties of valuer and surveyor and for all other duties to be performed by him under the Act, including those before prescribed,—6. That, as the basis of the annual value of lands entitled to allotments, the said William Brown shall take and consider the woodland as being of the value of 10*s.* per acre, and, as to the cultivated lands; unless other directions shall be given from persons interested in the said lands, and agreed upon at some meeting to be held for that purpose, the said William Brown shall take the sums at which the said lands were valued on the commutation of the tithes, excepting in reference to such lands as have been since such tithe commutation converted from woodland into cultivated lands, or from cultivated lands into woodland, which lands so converted shall be valued by the said William Brown, and for which he shall be paid at the rate of 6*d.* per acre,—7. That, in respect of lands to be exchanged under the provisions of the Act, the valuer shall be entitled to the same rate per acre for his trouble in carrying out such exchange as if such exchanged land had been originally allottable land under the enclosure, and no more, such rate per acre to include all charges of every kind by the valuer in respect of such exchange. It was moved by Mr. Rose, and seconded by Mr. Wroughton, and resolved, That it be an instruction to the valuer to apportion the expenses of the enclosure in respect of the allotment made to Mr. Grubb, and also in respect of the common field land to be enclosed, and that the proportion of expenses payable in respect of such allotment to Mr. *Grubb and such common field lands be defrayed by a rate upon such lands under the terms of the General [*812

Enclosure Act; and that the remainder of the expenses, so far as practicable, be discharged by a sale of lands either by public auction or private contract, as the valuer may deem most advantageous to the general body of the proprietors, such sale and private contract nevertheless not to take place without the express sanction of the Enclosure Commissioners,—any sales by private contract to be confined, however, to frontages only; that it be a further instruction to the valuer to set out a sufficient allotment of land at Naphill Common for a parish school, with a garden to be attached thereto, not exceeding half an acre in the whole:" That they the said defendants allowed such instructions except the said sixth recited resolution or instruction, which they disallowed: That no other instructions were framed by them or resolved upon by the parties interested in the enclosure, but that such instructions, so altered by the disallowance aforesaid, after being duly approved in manner provided by the last-mentioned Act, were delivered to the valuer, as directed by the said Act; and, after duly proceeding in the matter of the said enclosure according to the provisions of the said last-mentioned Act, the said valuer did in the first place, according to the provisions of the 62d section of the said last-mentioned Act, set out certain public roads and ways in and over the lands by the said provisional order directed to be enclosed, and the said valuer stopped up, diverted, and altered other public roads and ways passing through divers parts of the said land, and, with the consent of the plaintiff, stopped up twelve public roads and footpaths which then passed through and over the said land by the said provisional order directed to be allotted to the plaintiff; and the said *813] valuer, acting *under the provisions of the said last-mentioned section, set out through and over the last-mentioned lands one public carriage-road and two public footpaths; and the plaintiff assented to such setting out, and did not appeal against the same; and afterwards, according to the provisions of the said Act, the said valuer proceeded to allot the lands by the said provisional order directed to be enclosed, and did allot such lands according to the terms of the provisional order, and, amongst others, he did allot to the plaintiff the lands by the said provisional order directed to be allotted to him: That the proceedings of the valuer in this plea above mentioned were some of the usual proceedings in the said enclosure in the declaration mentioned; and, after the division and allotment of all the said lands by the said provisional order directed to be enclosed as aforesaid, the said valuer drew up and sent to the defendants, and deposited for inspection, his report as in the declaration is mentioned, according to the provisions of the 102d section of the said last-mentioned Act: and, after the said report had been so deposited, notice was duly given according to the provisions of the 103d section of the last-mentioned Act appointing a place and time for a meeting to hear objections to any allotment, direction, determination, or matter in the said report: That a meeting was held in accordance with such notice, and that the plaintiff attended such meeting, and that Nathan Wetherell, Esq., barrister at law, was duly appointed assistant commissioner to attend such meeting, and did attend accordingly; and at the said meeting Roger Williams in the declaration mentioned, to whom certain of the land directed by the provisional order to be

enclosed had been allotted as in the declaration mentioned, attended and objected to the said report, and to the directions and determination of the *said valuer (as the fact was), that, before the said [*814
public roads over the lands allotted to the plaintiff were stopped up as aforesaid, he and the occupiers of the lands allotted to him and by the said provisional order directed to be enclosed had by means of some or one of the said public roads far nearer and more convenient access from the said land allotted to him to Aylesbury than he and the occupiers of the said land would thenceforth have if the said report and proceedings were confirmed, and no other way were set out than was mentioned or set out in the said report; and he further applied to the said assistant commissioner to amend the said report, and the allotments, directions, determinations, and matters therein mentioned, by setting out in the said report and specifying in the map thereunto annexed a private or occupation road or way through or over Piggott's Common, for the more convenient occupation of the said lands so allotted to the said Roger Williams as aforesaid, for the use of the person interested in such lands; and the said Roger Williams alleged and proved before the said assistant commissioner that the said private or occupation road if set out would save a mile or a mile and a half in going from the said lands to Aylesbury aforesaid, and that, before the said proceedings in the said enclosure, there had been a public road over the lands by the said provisional order directed to be enclosed, in the same direction, by which the said Roger Williams and the occupiers of these lands so allotted to him had been accustomed to go over the said lands to Aylesbury aforesaid, which in the course of the said proceedings had been and would be, if the report and award founded thereon were confirmed by the defendants, for ever stopped up and extinguished: That the plaintiff was present at the said meeting when the said Roger Williams made such objection and *application, and argued the matter of the said application [*815
before the said Assistant Commissioner, and objected to the power and jurisdiction of the said value, or of the defendants, or of the said Assistant Commissioners to set out the said private road, but did not dispute the facts so alleged by the said Roger Williams; and that the Assistant Commissioner, having duly considered the evidence and arguments of the plaintiff and the said Roger Williams, was of opinion that the valuer should be allowed to set out such private road, and reported such his opinion to the defendants; wherefore the defendants directed the said William Brown, as such valuer as aforesaid, to set out, and accordingly the said William Brown, as such valuer as aforesaid, acting in the matters of the said enclosure, since sending the report to the office of the defendants, did, under the directions of the defendants, set out the private road or way as in the declaration mentioned, the same being the private road or way which the said Assistant Commissioner was of opinion ought to be set out as aforesaid: That the area occupied by the public road and two footpaths so set out over the lands allotted to the plaintiff as aforesaid and by the said private road, does not exceed one-fourth of the area occupied by the public roads and footpaths which before the said enclosure passed over the said last-mentioned lands, and were stopped up as aforesaid: That the soil of the roads so stopped up has

(subject to the confirmation of the award of the said valuer by the defendants) fallen into and become part of the lands so allotted to the plaintiff; and that, by reason thereof, he has been fully recompensed for any injury which he may have sustained (if any) by reason of the setting out of the said private road: That all the proceedings in the matter of the said enclosure in the declaration and in this plea mentioned or referred to, had been regular *and in accordance with
*816] the provisions of the said Acts of Parliament in the declaration mentioned: And that all objections to the said report had been disposed of, and an amendment had been made in the allotments, directions, and matters therein contained (that is to say), by the setting out of the said private road; and that they had directed the valuer to draw up and engross on parchment the award in the matter of the said enclosure, and in his said award to set out the said private road or occupation road as in the declaration mentioned; and that, unless prohibited therefrom, they would proceed to confirm the said award, as under the circumstances in the declaration and in this plea mentioned they lawfully might for the causes aforesaid, and as it was their duty under the said Acts of Parliament in the declaration and in this plea mentioned; wherefore the defendants prayed that the said writ of prohibition prayed for in the declaration might not issue.

The defendants also demurred to the declaration,—the ground of demurrer stated in the margin being, "that the declaration shows that the defendants have jurisdiction under the Enclosure Acts to confirm the award therein mentioned." Joinder.

The plaintiff demurred to the plea,—the ground of demurrer stated in the margin being, "that the plea does not show that the defendants have jurisdiction to set out the road in question." Joinder.

Upon the demurrers coming on for argument, the Court gave judgment pro formâ, in accordance with their decision upon the motion. The plaintiff thereupon sued out a writ of error, alleging for grounds of error, "that the valuer had no authority to set out the road in question over the plaintiff's land; that the setting out the road in question is contrary to the terms and conditions of the provisional
*817] order, and of *the agreement under which the plaintiff consented to the enclosure; and that the plea does not show that the valuer had authority to set out the road in question, or that the defendants have jurisdiction to confirm the award with the road so set out."

The case came on for argument before Wightman, J., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Wilde, B.

Couch (with whom was *Lush*, Q. C.), for the plaintiff, repeated the arguments urged in the Court below.

F. M. White, contrà, was not called upon.

WIGHTMAN, J., delivered the opinion of the Court:—

The question in this case turns upon the effect of the provisional order. It is contended for the plaintiff that it conveys to him an indefeasible right to the land thereby directed to be allotted to him, free and clear of all charges and encumbrances, and especially from those of roads and ways. The provisional order is silent as to the making of roads; so that there are no words excluding the Commissioners or the valuer from setting out private ways. The Enclosure

Acts provide that the valuer is to set out ways after the issuing of the provisional order, and before the final allotment of the land to be enclosed: and by s. 68 of the General Enclosure Act, 8 & 9 Vict. c. 118, the valuer is authorized to set out roads through the lands to be enclosed. We think that the provisional order must be taken to have been made subject to the power of the valuer to deal with private rights, so far at least as to setting out a private or occupation road.

The judgment of the Court of Common Pleas will therefore be affirmed. Judgment affirmed.

*CAHILL *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY. [*818

By their Act of Parliament and their published notices, a railway Company were bound to allow each passenger to take with him a certain weight of ordinary personal luggage, without any charge for the carriage. The plaintiff, a passenger by the railway, who was stated in a special case to have had no knowledge of the Act of Parliament or the notice, brought with him as luggage a box *containing only merchandise*, but not exceeding in weight the limit prescribed for personal luggage. On the box was painted in large letters the word "Glass." No information was given by the plaintiff to the Company's servants, nor was any inquiry made by them, as to the contents of the box:—

Held,—affirming the judgment of the Court of Common Pleas,—that, inasmuch as the box contained merchandise only, and not personal luggage, there was no contract on the part of the Company to carry it, and that consequently they were not liable for the loss.

By their Act of Parliament 9 & 10 Vict. c. cciv., s. 66, and their published notices, the London and North Western Railway Company were bound and professed to allow each passenger to take with him his ordinary luggage, not exceeding certain weights according to class, without any charge for the carriage. The plaintiff, a passenger by the railway, who was stated in a special case to have had no knowledge of the Act of Parliament or the notice, brought with him as luggage a box *containing only merchandise*, but not exceeding in weight the limit prescribed for personal luggage. On the box was painted in large letters the word "Glass." No information was given by the plaintiff to the Company's servants, nor was any inquiry made by them, as to the contents of the box. In an action against the Company for the loss of the box and its contents, the Court of Common Pleas held, that, inasmuch as the box contained merchandise only, and not personal luggage, there was no contract on the part of the Company to carry it, and that consequently they were not liable for the loss: vide 10 C. B. N. S. 154 (E. C. L. R. vol. 100).

The plaintiff thereupon brought a writ of error, which was argued in the Exchequer Chamber before Cockburn, C. J., Pollock, C. B., Wightman, J., Crompton, J., Channell, B., and Wilde, B.

Beasley, for the plaintiff in error, urged, as was *urged in [*819 the Court below, that, as the Company chose to receive the package as ordinary luggage, and there was no misrepresentation on the part of the plaintiff, they were responsible for the loss.

Welsby, contrà, was not called upon.

COCKBURN, C. J.—I am of opinion that the judgment of the Court of Common Pleas ought to be affirmed. If a railway Company, who

by their Act of Parliament are bound or by their regulations profess to carry personal luggage free, choose to take as ordinary luggage that which they know to be merchandise, I quite agree that it is not competent to them, in the event of a loss, to claim exemption from liability on the ground that the article consists of merchandise and not of ordinary luggage. But, on the other hand, if a passenger who knows or ought to know that he is only entitled to have his ordinary personal luggage carried free of charge, chooses to carry with him merchandise, for which the Company are entitled to make a charge, he cannot claim to be compensated in respect of any loss or injury by the Company, to whom he has abstained from giving notice of the contents. In such a case he carries it at his own risk. The question, therefore, comes to this, was there knowledge on the part of the Company that the box which the plaintiff was carrying with him as personal luggage in fact contained merchandise? That which was said by Parke, B., in The Great Northern Railway Company, app., Shep-
*820] herd, resp., 8 Exch. 30,†(a) *is in perfect conformity with the view which we now take of the question. Can we, from the facts stated in the special case, come to the conclusion that there was knowledge on the part of the Company, by their servants, that this box contained merchandise? I must confess I do not see my way to that conclusion. It is true that the package bore the semblance of a package of merchandise: and it was marked "Glass." But many packages which do not contain merchandise are so marked in order to secure their being handled with more than ordinary caution. It is not found in the case that the Company or their servants had any knowledge on the subject: nor do I think we can assume it as a legitimate conclusion from the facts as stated.

The rest of the Court concurrring, Judgment affirmed.

(a) "If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the Company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss."

MARSHALL, Clerk, *v.* THE BISHOP OF EXETER and Another.

Held,—affirming the judgment of the Court of Common Pleas,—that a bishop has no right to demand from the presentee of a benefice, before he will institute him, a testimonial from the bishop of another diocese in which the party has had cure of souls, of his "honest conversation, ability, and conformity to the ecclesiastical laws of England."

ERROR upon a judgment on demurrer in a quare impedit in the Common Pleas, 7 C. B. N. S. 643 (E. C. L. R. vol. 97).

There were two counts, the substance of which was that the bishop had improperly refused to admit, institute, and induct a clerk presented to him by the plaintiff, the patron, to the parish of St. James and Cuby, in the county of Cornwall, within his diocese.

*821] *The plea justified the refusal, on the ground that the clerk presented came from the diocese of Manchester, where he had held a benefice and cure of souls, but did not bring from the bishop of the diocese whence he came any sufficient testimony, according to

the laws of England, of his honest conversation, ability, and conformity to the ecclesiastical laws of England, or any such testimony as the said Bishop (of Exeter) was bound and ought by the laws ecclesiastical of England to require and have and receive from the diocese from whence the clerk had come, and in which he had so held a benefice and cure.

The replication set forth a testimonial which the clerk produced, signed by three beneficed clergymen of the diocese of Manchester, stating that he had been personally known to them for three years last past; that, during the whole of that time, they verily believed that he had lived piously, soberly, and honestly, and had not at any time, as far as they knew or believed, held, written, or taught anything contrary to the doctrine or discipline of the church of England; and that they believed him in their consciences to be, as to his moral conduct, a person worthy to be admitted to the said benefice. It also set out a certificate, signed by the Bishop of Manchester, to the following effect,—"The subscribers are beneficed in the diocese of Manchester. Mr. Reid was long non-resident on his benefice; but I know no reason why he should be legally hindered from his being allowed to take other duty." The replication then averred that the bishop continued to require further testimony, and, none being produced, collated another clerk after the lapse of six months.

The Court of Common Pleas held, on demurrer, that the bishop had no right to demand such a testimonial: and upon that judgment the defendants brought error.

*The case was argued before Cockburn, C. J., Pollock, C. B., Wightman, J., Crompton, J., Bramwell, B., Channell, B., and Wilde, B. [*822

Karslake, Q. C. (with whom was *M. Smith*, Q. C.), urged the same arguments and cited the same authorities which he had unsuccessfully adduced in the Court below.

Coleridge, Q. C. (with whom was *Collier*, Q. C.), contrà, was not called upon.

COCKBURN, C. J., delivered the judgment of the Court:—

We are of opinion that the judgment of the Court of Common Pleas ought to be affirmed. Whatever may have been in the ancient days of the Church the Canon law with respect to clerks coming from other dioceses, a great deal of the Canon law and the constitution of provincial and diocesan synods cannot be considered to be law at the present day. About the 23d of Henry 8, it was thought that much of the ecclesiastical law was opposed to the prerogative of the Crown, and burthensome to the subject; and a commission was to be appointed for the purpose of reviewing the body of the Canon law. This wise intention was never carried out. But, on the accession of James 1, that monarch directed the synod of Canterbury to draw up a body of Canon law: and the Canons of 1603 were accordingly framed. We must take those Canons as expounding what was then considered as the Canon law of that day as to the institution of benefices. We must look to them, therefore, and not to the more ancient Canon law upon the subject. All that was required on the present occasion, *was, that which is pointed out by the 39th Canon,—"No bishop shall institute any to a benefice who hath been ordained by [*823

any other bishop, except he first show unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it, and lastly, shall appear, upon due examination, to be worthy of his ministry." With these requirements the clerk presented by the plaintiff in this case has complied: and the plea does not allege the absence of any one of these qualifications. But it is said that the 48th Canon contains words of larger import, embracing all curates and ministers with cure of souls. The words are,—"No curate or minister shall be permitted to serve in any place without examination and admission of the bishop of the diocese or ordinary of the place having episcopal jurisdiction, in writing, under his hand and seal, having respect to the greatness of the cure and meetness of the party. And the said curates and ministers, if they remove from one diocese to another, shall not be by any means admitted to serve without testimony of the bishop of the diocese or ordinary of the place aforesaid whence they came, in writing, of their honesty, ability, and conformity to the ecclesiastical laws of the church of England. Nor shall any serve more than one church or chapel upon one day, except that chapel be a member of the parish church, or united thereunto, and unless the said church or chapel where such a minister shall serve in two places be not able in the judgment of the bishop or ordinary as aforesaid to maintain a curate." If the present case falls within that Canon, it may be taken that the clerk presented by the plaintiff had not complied with its requisitions. But we are of opinion that it is too plain to admit of doubt, that the curates and ministers referred to in the 48th Canon are entirely
*824] *distinct and different from those referred to in the 39th Canon. The Canons seem to follow each other in a kind of analytical arrangement. From the 39th to the 47th Canons, there is a series of provisions and enactments with regard to a minister to be instituted; in other words, applicable to a beneficed clerk. The Canons next proceed to deal with cases in which the proper beneficed clergyman is absent, and provides for his absence being supplied by a curate. Here we have sections applicable to curates as we now understand the term. Mr. *Karslake* has contended that the words "curate" and "minister" in the 48th Canon must have a larger sense than the modern term "curate." We, however, think that that Canon was intended to apply to the case of persons who are put in the place of beneficed incumbents. The language of the 48th Canon differs materially from that of the 39th. It speaks of curates and ministers who are "permitted to serve" in a place, not as those who are there by right. An ingenious argument was founded on the statute 13 Eliz. c. 12, s. 3, that in certain cases deacons might be instituted to benefices, though they could not be admitted to a cure of souls. No such distinction has been pointed out in any of the Canons, or by any of the text-writers. But, if any doubt could remain as to the construction of the Canons, we think the solution is to be found in the contemporaneous exposition, and in the usage since the time that they were made. It has never occurred to any author to entertain any such notion. If all bishops who had to institute clerks coming from other dioceses had insisted upon these letters testimonial coming with the clerk who sought institution from the bishop from whose diocese he

came, we should have thought that usage entitled to great weight. But, so far as we are aware, no such practice has ever existed. The practice under *the Canons, extending over nearly three centu- [*825
ries, is to the contrary.

For these reasons, we are of opinion that the judgment of the Court below is right, and must be affirmed. Judgment affirmed.

THE DANUBE AND BLACK SEA RAILWAY AND KUSTENDJIE HARBOUR COMPANY (LIMITED) *v.* XENOS.

XENOS *v.* THE DANUBE AND BLACK SEA RAILWAY AND KUSTENDJIE HARBOUR COMPANY (LIMITED).

On the 9th of July, 1860, X., by his agent, agreed with the Danube and Black Sea Railway Company to receive certain goods on board his ship, to be carried to a port in the Black Sea,—the shipment to commence on the 1st of August. On the 21st of July, X. wrote to the defendant stating that he did not hold himself responsible for the contract, the agent having no authority to make it; and on the 23d he wrote again, offering a substituted contract, but still repudiating the original contract. The Company by their attorneys gave X. notice that they should hold him bound by the original contract, and that, if he persisted in refusing to perform it, they should forthwith proceed to make other arrangements for forwarding the goods, and look to him for any loss. On the 1st of August, X. again wrote to the Company, stating that he was then prepared to receive the goods on board, still making no allusion to the original contract. The Company having in the mean time entered into a negotiation with another shipowner for the conveyance of the goods, which ended in a contract with him on the 2d of August, sued X. for his refusal to receive the goods pursuant to his contract: and X. brought a cross-action against the Company for refusing to ship.

Held,—affirming the judgment of the Common Pleas, upon a special case stated in both actions,—that it was competent to the Company to treat X.'s renunciation as a breach of the contract, and to sue him thereon; and that the fact of such renunciation afforded a good answer to the cross-action of X., and sustained the Company's plea thereto, that before breach X. discharged them from the performance of the agreement.

THESE were cross-actions in which a case was stated for the opinion of the Court of Common Pleas.

The material facts stated in the special case were these:—On the 9th of July, 1860, Mr. Xenos, who carried on an extensive shipping concern under the name of The Greek and Oriental Steam Navigation Company (Limited), by one Fitze, his agent, agreed to receive certain goods of the Danube and Black Sea Railway and Kustendjie Harbour Company (Limited), *on board his ship Mavrocordatos, to be [*826
carried to Kustendjie, a port in the Black Sea,—the shipment to commence on the 1st of August. On the 21st of July, Xenos wrote to the Company stating that he did not hold himself responsible for the contract, the agent having no authority to make it; and on the 23d he wrote again, offering a substituted contract, but still repudiating the original contract. The Company by their attorneys gave Xenos notice that they should hold him bound by the original contract, and that, if he persisted in refusing to perform it, they, the Company, should forthwith proceed to make other arrangements for forwarding the goods to their destination, and look to him for any loss. On the 1st of August, Xenos again wrote to the Company, stating that he was then prepared to receive the goods on board the Mavrocordatos, making no allusion to the original contract. The Company, however, had in the mean time entered into a negotiation

with another shipowner for the conveyance of their goods by another ship, which negotiation ended in a contract for that purpose with that person on the 2d of August. The Company thereupon sued Xenos for refusing to receive the goods pursuant to his contract: and Xenos brought a cross-action against the Company for refusing to ship.

The Court of Common Pleas, upon these facts, held that it was competent to the Company to treat Xenos's renunciation as a breach of the contract, and sue him thereon; and that the fact of such renunciation afforded a good answer to the cross-action of Xenos, and sustained the Company's plea thereto, that before breach Xenos discharged them from the performance of the agreement.

Upon this judgment Xenos brought a writ of error, and the case
*827] was argued in the Exchequer Chamber *before Cockburn, C. J., Pollock, C. B., Wightman, J., Crompton, J., Channell, B., and Wilde, B.

Honyman (with whom was *Bovill*, Q. C.), for the plaintiff in error, admitting that Xenos was bound by the contract made by his agent, submitted, that, whatever was said or done by Xenos before the arrival of the time for the performance of that contract, though the Company might have had a right thereupon to rescind the contract, it was not competent to them at once to enter into a contract with another person for the carriage of the goods before any actual breach, and sue Xenos; for, that his refusal to perform the agreement might have been retracted before the day for shipping the goods arrived. He referred to and commented upon the following cases,—**Phillpotts** *v.* Evans, 5 M. & W. 475;† Ripley *v.* M'Clure, 4 Exch. 345;† Hochster *v.* De la Tour, 2 Ellis & B. 678 (E. C. L. R. vol. 75); Avery *v.* Bowden, 5 Ellis & B. 714 (E. C. L. R. vol. 85), (in error, 6 Ellis & B. 953 (E. C. L. R. vol. 88);) Esposito *v.* Bowden, 4 Ellis & B. 963 (E. C. L. R. vol. 82), (in error, 7 Ellis & B. 763 (E. C. L. R. vol. 90.)) [CROMPTON, J., referred to Emmens *v.* Elderton, 4 House of Lords Cases 624, 13 C. B. 495 (E. C. L. R. vol. 76.)]

Per CURIAM.—Upon receiving notice from Xenos that he would not receive the cargo upon the terms agreed upon, the Company had a right at once to treat that as a breach. We are all of opinion that the judgment of the Court of Common Pleas was right, and must be affirmed. Judgment affirmed.

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*828] *BROWN and Others *v.* THE MAYOR AND COMMONALTY AND CITIZENS OF THE CITY OF LONDON.

The corporation of London were empowered by various Acts of Parliament passed at a time when they claimed a right to the soil and bed of the Thames, and exercised the power of conservancy thereof from Staines Bridge to Yantlett Creek, to borrow money to be expended in the improvement of the navigation of the river westward of London Bridge, and to levy tolls and duties upon boats and other vessels navigating the river between Staines and London Bridge, and to charge the moneys borrowed under the Acts upon such tolls, by way of life annuity or bond.

The corporation accordingly raised large sums on bonds conditioned for the payment of certain yearly sums "out of the tolls and duties granted and made payable by virtue of the said Acts," until payment of the principal: and such yearly sums were duly paid by them down to the passing of the Thames Conservancy Act, 21 & 22 Vict. c. cxlvii.

By that Act,—which professed to be passed, amongst other things, for the purpose of carrying out an agreement between the Crown and the Corporation for the settlement of conflicting claims between them in respect of the right to the soil and bed of the Thames,—the conservancy of the river is taken away from the corporation and vested in a newly created body of twelve conservators (of whom seven are members of the corporation of London), in whom all the right and interest of the Crown and of the corporation in the bed and soil of the river are vested, as well as the power to receive and apply the tolls above mentioned, and all other tolls, dues, &c.

There is no express provision in the last-mentioned Act either for discharging the corporation from liability on these securities, or imposing any liability upon the newly created body in respect of them:—

Held,—affirming the judgment of the Court of Common Pleas,—that the performance of the obligation by the corporation having been rendered impossible by act of the law, the obligation was discharged, and no action would lie against the corporation thereon.

THIS was an action brought by the plaintiffs as executors of one Anthony Brown, deceased, against the corporation of London, to recover the amount of ten several bonds of 2000*l.* each under the corporation seal.

The corporation of London were empowered by various Acts of Parliament passed at a time when they claimed a right to the soil and bed of the river Thames, and exercised the power of conservancy thereof from Staines Bridge to Yantlett Creek, to borrow money to be expended in the improvement of the navigation of the river westward of London Bridge, and to levy tolls and duties upon boats and other vessels navigating the river between Staines and London Bridge, and to charge the moneys borrowed under the Acts upon such tolls, by way of life annuity or bond. The corporation accordingly raised large sums on bonds conditioned for the payment of certain yearly *sums "out of the tolls and duties granted and made payable by virtue of the said Acts," until payment of the principal: [*829 and such yearly sums were duly paid by them down to the passing of the Thames Conservancy Act, 21 & 22 Vict. c. cxlvii. By that Act,—which professed to be passed, amongst other things, for the purpose of carrying out an agreement between the Crown and the corporation for the settlement of conflicting claims between them in respect of the right to the soil and bed of the Thames,—the conservancy of the river is taken away from the corporation and vested in a newly-created body of twelve conservators (of whom seven were members of the corporation of London), in whom all the right and interest of the Crown and of the corporation in the bed and soil of the river were vested, as well as the power to receive and apply the tolls above mentioned, and all other tolls, dues, &c). There was no express provision in the last-mentioned Act either for discharging the corporation from liability on these securities, or imposing any liability upon the newly-created body in respect of them. The Court of Common Pleas, —dissentiente Willes, J.,—held that the performance of the obligation by the corporation having been rendered impossible by act of the law, the obligation was discharged, and no action would lie against the corporation thereon: 9 C. B. N. S. 726 (E. C. L. R. vol. 99).

Upon this judgment the plaintiffs brought a writ of error: and the case was argued before Cockburn, C. J., Pollock, C. B., Wightman, J., Crompton, J., Channell, B., and Wilde, B.

Lush, Q. C., for the plaintiffs in error, repeated the arguments which were urged in the Court below, viz. that the corporation were not

discharged from their obligation by reason of the tolls out of which
*830] the *annuities were made payable being no longer received by them or under their control, there being nothing in the provisions of the Thames Conservancy Act, 21 & 22 Vict. c. cxlvii., expressly exempting them from such liability and transferring it to the newly-created body of conservators, and it being the duty of the latter to hand over to the corporation so much of the tolls and dues as might suffice to pay those annuities; and that, even assuming that, as a general rule of law, a condition fails when it becomes illegal or impossible of performance by act of God or the law, that rule does not apply to a case where the impossibility arises from some act superinduced by the party himself, as, in this case, from the provisions of an Act of Parliament which was passed at the instance of the corporation themselves.

Mellish, Q. C., appeared for the defendants: but the Court intimated that they did not desire to hear him on the first point, and that they would take time to consider whether they would hear him on the second point. *Cur. adv. vult.*

COCKBURN, C. J., on a subsequent day, delivered the judgment of the Court:—

In this case the Court took time to consider whether it would be necessary to hear Mr. *Mellish* upon the second point urged by Mr. *Lush*, viz. whether, the corporation of London having been parties to the Act of Parliament for settling the conservancy of the river Thames, and therefore parties to the enactments whereby the fund out of which the bonds in question were to be paid was taken out of their control, the doctrine of law which excuses the non-performance of a
*831] condition the performance of which has by act of the *law become impossible is applicable to this case. We have not, however, thought it necessary to trouble Mr. *Mellish*; for, upon consideration, although it may be that some private Acts of Parliament amount to no more, or little more, than private agreements between the parties at whose instance they are passed, we think that cannot be said of an Act of Parliament such as the present, which deals with public rights and matters of great public interest. An Act of Parliament the subject-matter of which is the conservancy of the river Thames and the tolls chargeable upon the public for the navigation thereof, and moreover which materially affects the prerogative and rights of the Crown, can hardly be looked upon as a private agreement. The Act of Parliament, therefore, having transferred the tolls out of which the bonds in question are made payable from the corporation to the conservators appointed by the Act, we are of opinion that the corporation are no longer liable to be called upon to satisfy the claims arising therefrom.

The judgment of the Court of Common Pleas, disaffirming that liability, will therefore be affirmed. Judgment affirmed.

*GARRARD and Another *v.* GUIBILEI. [*832

In an action against baron for goods sold to the feme dum sola, it is not competent to the Judge at Nisi Prius to amend the record by making the feme a co-defendant.

THIS was an action brought by the plaintiffs, silversmiths and jewellers in London, to recover the sum of 33*l.* 13*s.* 6*d.*, for goods supplied by them to the defendant's wife, Lady Sophia Guibilei, before her marriage with the defendant. The declaration was in the ordinary indebitatus form for goods sold to the defendant, and on an account stated.

At the trial it was objected, on the part of the defendant, that the wife should have been a co-defendant, and that the Judge had no power to amend the record by adding her name, and so cure the variance between the declaration and the evidence.

Keating, J., allowed the amendment, adding the name of the wife, and alleging that the goods were sold to her before the marriage; but he reserved leave to move to enter a nonsuit. A rule nisi was afterwards obtained, which was made absolute in Hilary Term, 1862: vide 11 C. B. N. S. 616 (E. C. L. R. vol. 103).

The plaintiffs appealed against that decision; and the case was argued in the Exchequer Chamber before Pollock, C. B., Crompton, J., Bramwell, B., Blackburn, J., and Mellor, J.

Bovill, Q. C. (with whom was *Needham*), for the appellant.—The learned Judge clearly had power under the 222d section of the Common Law Procedure Act, 1852, to make the amendment in question. Even before the passing of that statute, it was in the discretion of the Courts to amend by adding parties. [CROMPTON, J.—That would have been an easy way of meeting a plea in abatement. But, how would you get over the variance between the original writ and *the præcipe?] The Courts were in the habit of amending where the remedy of the party would otherwise have been barred by the Statute of Limitations. [POLLOCK, C. B.—I always thought that was a case in which the Courts ought not to amend.] In Brown *v.* Fullerton, 13 M. & W. 556,† the Court of Exchequer allowed the assignees of a bankrupt to amend the writ of summons and subsequent proceedings by adding the name of the official assignee, in order to save the Statute of Limitations,—observing that they did so in compliance with the precedents in that Court which they had acted upon on several occasions. [BRAMWELL, B.—How would you amend the account stated?] That might be struck out. In Lakin *v.* Watson, 2 C. & M. 685,† the Court allowed the name of a co-executrix to be inserted as a co-plaintiff; Parke, B., saying that "the majority of the Judges have resolved, that, in future, no amendment of this kind in a writ of summons ought to be allowed, except where it appears to the Court that the result of refusing it would be to deprive the party of his remedy." These, it is true, were cases of plaintiffs being added. [POLLOCK, C. B.—Do you find any case where this was done at Nisi Prius, even for a plaintiff, or after declaration and plea and issue joined?] In Lakin *v.* Watson, it was after a plea of non-joinder. In a case like this there can be no real hardship in allowing the amendment. Where husband and wife are sued jointly, service

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of the writ upon the husband only is sufficient. [BLACKBURN, J.—In the cases you rely upon, the writ issued varied from the writ intended to be issued. Here, there has been no mistake, except it be that the plaintiffs were mistaken in supposing that they could sue the husband alone for a debt contracted by the wife dum sola. This amendment in effect changes the parties.] The object of the amend-
*834] ment clauses in the Common Law *Procedure Act was, to remedy an admitted evil, and to compel the Judges to make all such amendments as might be necessary for the purpose of determining in the existing suit the real question in controversy. [BLACKBURN, J.—Between the parties.] That the power to make this amendment under s. 222 of the 15 & 16 Vict. c. 76 exists, has been distinctly decided by the Court of Exchequer in Blake *v.* Done, 7 Hurlst. & N. 465.† There, in ejectment by mortgagee of the devisee against the heir at law, in which the question was as to the competency of the testator to make a will, it appeared at the trial that the legal estate was in two trustees, the devisee having an equitable interest only: and it was held that the Judge had power under the above section to amend the writ by adding the names of the two trustees, they being present in Court and consenting to be parties. [CROMPTON, J.—Ejectment depends on peculiar considerations: it was like adding a count on a different lease by John Doe.] Where the Judge has a discretion, and makes the amendment, that is not the subject of appeal: Wilkin *v.* Read, 15 C. B. 192 (E. C. L. R. vol. 80). [CROMPTON, J.—We do not mean to overrule the learned Judge's discretion.] In Blake *v.* Done, Pollock, C. B., says: "Whenever there is any error in the proceeding, whether with reference to the parties to the suit, or the pleadings, or otherwise, if it becomes necessary to correct the mistake in order to determine the real question in controversy, it is competent for the Court, or any Judge thereof, or the Judge at Nisi Prius, to make any alteration for that purpose. I can well understand that a change of parties may be necessary in certain events. It is well known to those concerned in the administration of justice that the mere person suing as plaintiff may not be the real plaintiff, and *that the person nominally sued as defendant may not be the real defendant;* and I
*835] think it is *competent, in an action of ejectment, as well as in any other action, to make every alteration which may be necessary to try the matter in dispute between the real litigant parties, always providing that no person shall be taken by surprise, and that what is done shall be really and substantially in furtherance of the right and justice of the case." [POLLOCK, C. B.—If I said that (as to adding a defendant), I never mean to say só any more.] What is there but the most subtle technicality to prevent the amendment here? Robson *v.* Doyle, 3 Ellis & B. 396 (E. C. L. R. vol. 77), and Wickens *v.* Steel, 2 C. B. N. S. 488 (E. C. L. R. vol. 89), may be cited to show that the 222d section does not apply to cases which come within the earlier sections as to the non-joinder or misjoinder of parties. But here the earlier sections confessedly do not apply, and therefore the case must fall within the 222d section.

Lush, Q. C., contrà, was not called upon.

POLLOCK, C. B.—I am of opinion that the judgment of the Court of Common Pleas must be affirmed. With respect to the case of

Blake *v.* Done, in the report of which I am represented to have said that the amendment might extend to the changing or adding of a defendant, all I can say is, that, if I did say so, I beg to withdraw it. I think I was quite wrong. It is perfectly impossible to say that an amendment can be made by adding the name of a defendant at the trial or at any other time. In the sense in which we are in the habit of using the expression, I am of opinion that the Judge at the trial had not the power to do that which he did. It is something totally out of the contemplation of the section.

CROMPTON, J.—I am of the same opinion.

*BRAMWELL, J.—I am of the same opinion. This is not the mere case of adding a defendant. No provision was made for [*836 that in the Common Law Procedure Act, for obvious reasons. What is the plaintiffs' case here? If it were expanded upon the record, it would be this,—"We claim so much for goods sold and delivered to the wife of the defendant during the coverture." That is the question they went down to try. When they come before the jury, it is found that the plaintiffs have a totally different cause of action. To do that which my Brother Keating did, was, not *amending*, but substituting an entirely different action for that which the plaintiffs had presented before him. As to the case of Blake *v.* Done, I must confess that when that case was before us I felt very considerable doubt about it. But, what was the contest between the parties there? In substance the plaintiff said, I claim against you the defendant the possession of certain land because a certain person made a will under which I have got an interest in it. The defendant took issue upon that, and the case went down to trial. The substantial party to the procedure was the plaintiff, Blake. But, as a court of law can only look at the legal title, it became necessary to add the names of the persons having the dry legal interest, viz., the trustees. The record was substantially the same there after the amendment had been made. It would not be so here. This was not an amendment, but an entire change of the action.

BLACKBURN, J.—I am of the same opinion. I quite concur in the reasons given in the judgments of Erle, C. J., and Willes, J., in the Court below. An ejectment stands upon a very different footing from any other action. Before the passing of the Common Law Procedure Act, 1852, the plaintiff in ejectment usually *laid his com- [*837 plaint under several demises, and, where there was any mistake in the statement of these, an amendment was always allowed. And, though it was thought proper to abolish the old fiction, and to substitute a simple writ as the commencement of the proceeding, it was the intention of the framers of that statute to leave to the Courts all the powers they before exercised as to amendments and otherwise. This is expressed by the 221st section, which enacts that "the several Courts and Judges thereof respectively shall and may exercise over the proceedings the like jurisdiction as heretofore exercised in the action of ejectment, so as to insure a trial of the title, and of actual ouster when necessary only, and for all other purposes for which such jurisdiction may at present be exercised." Whether they have succeeded or not, is another matter. The so-called amendment here is not correcting a blunder for the purpose of trying what the parties

went down to try: it is substituting an entirely different action. It was therefore an amendment which was beyond the competency of the Judge.

MELLOR, J., concurred. Judgment affirmed.

*838] *THE GREAT CENTRAL GAS CONSUMERS COMPANY v. CLARKE.

A clause in a private Act of Parliament which is quite inconsistent with a clause in a subsequent public Act dealing with the same subject, is thereby repealed.

A gas Company were by their Act of incorporation restricted to a charge of 4s. per 1000 cubic feet. By a subsequent public Act (23 & 24 Vict. c. 125) for the supply of gas to the metropolis, an increased standard of purity and illuminating power was required from the companies electing "to adopt the provisions of that Act as to price, purity, and illuminating power," and an increased charge allowed to be made by them:—Held, affirming the judgment of the Court of Common Pleas,—that the Company were no longer subject to the restriction as to price contained in the private Act.

THIS was a writ of error upon a judgment of the Court of Common Pleas upon a special case.

The case in substance stated that the plaintiffs' Company were by a clause of their Act of incorporation, 14 & 15 Vict. c. lxix., restricted to a charge of 4*s.* per 1000 cubic feet; and that the Company, having elected to adopt the provisions of the Metropolis Gas Act, 1860, relating to price, purity, and illuminating power of gas,—which provisions enjoined the supply of a greatly superior quality of gas, and authorized a charge not exceeding 5*s.* 6*d.* per 1000 cubic feet,—claimed to be entitled to charge 4*s.* 6*d.* per 1000 cubic feet, notwithstanding the restricting clause in their private Act.

The Court below held that the clause of the public Act, being inconsistent with the provision of the private Act, impliedly repealed it. Vide 11 C. B. N. S. 814 (E. C. L. R. vol. 103).

The case was argued in the Exchequer Chamber, before Pollock, C. B., Wightman, J., Channell, B., Blackburn, J., and Mellor, J., by *C. Pollock* (with whom were the *Recorder of London* and *Ogle*), for the plaintiff in error, and by *Sir Fitzroy Kelly*, Q. C. (with whom was *Lush*, Q. C.), for the defendants in error. The arguments were substantially a repetition of those which were urged in the Court below,—the only additional authorities referred to being Williams *v.* Pritch-
*839] ard, 4 T. R. 2, and The London and Blackwall Railway *Company *v.* The Limehouse Board of Works, 26 Law J., Ch. 164.

POLLOCK, C. B., delivered the judgment of the Court:—

We are all of opinion that the judgment of the Court of Common Pleas ought to be affirmed. The general Act for the better regulation of the supply of gas to the metropolis, 23 & 24 Vict. c. 125, by s. 36 enacts that "all contracts made or existing before the 1st of January, 1860, between any of the gas Companies included in this Act and any local authority, for or relating to the supply of gas, shall terminate on the 1st of February, 1862, and thereafter the provisions of this Act in all particulars shall apply to such Company; provided that, from the time of the passing of this Act until the said 1st of February, 1862, the provisions of this Act relating to price, purity, and illuminating

power of gas, shall not apply to any such Company, unless such Company shall elect to adopt them." This Company did elect to adopt those provisions, and therefore the 36th section did apply to them; they are bound to supply a more expensive gas than before, and the price to be charged is regulated by the general Act. Then, the 19th section is general and applies to every one: it enacts, that, "subject to the provisions of this Act, every gas Company, from time to time, may enter into any contract with any owner, occupier, or local authority, for all or any of the following purposes, that is to say, *for supplying him or them with gas*, and with pipes, burners, meters, lamps, lamp-posts, and other apparatus, and for the repair and cleansing and for the lighting and extinguishing thereof, in such manner and on such terms and conditions as the parties agree." The 25th section, which regulates the quality, compels all Companies adopting the Act and coming *within its provisions to supply a vastly superior gas than was before supplied: and the 40th section authorizes [*840 a maximum charge of 5*s.* 6*d.* per 1000 cubic feet for common gas, and 7*s.* 6*d.* per 1000 cubic feet for cannel gas. The 24th section of the Great Central Gas Consumers Act, 1851 (14 & 15 Vict. c. lxix.), enacts that "it shall not at any time be lawful for the Company to demand and receive from any person or corporation who shall use or burn gas manufactured or purchased and supplied by the Company, either for public or private use, and used by the meter, any sum exceeding the rate of 4*s.* per 1000 cubic feet of such gas." Although that section is not in terms repealed, yet it becomes a clause in a private Act of Parliament quite inconsistent with a clause in a subsequent public Act. That is sufficient to get rid of the clause in the private Act. Looking at the 19th section of the general Act, we think it is impossible to read it otherwise than as repealing the 24th section of the private Act. We are bound as well by the plain words of the Act as by the general scope and object of it, and also by the justice of the case.

Judgment affirmed.

*WEBB *v.* BIRD and Others. [*841

The right to the passage of air is not a right to an easement within the meaning of the 2 & 3 W. 4, c. 71, s. 2.

The presumption of a grant from long-continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant.

Held, therefore,—affirming the judgment of the Court of Common Pleas,—that a grant of a right to the free and uninterrupted passage of the currents of wind and air to the plaintiff's mill from over the soil of another, cannot be presumed from an uninterrupted user of the mill for twenty years.

THIS was a writ of error upon a case stated by an arbitrator for the opinion of the Court of Common Pleas, upon the argument of which that Court held that the owner of a windmill cannot claim, either by prescription, or by presumption of a grant arising from twenty years' acquiescence, to be entitled to the free and uninterrupted passage of the currents of wind and air to his mill; and that such a claim is not within the 2d section of the 2 & 3 W. 4, c. 71, which is confined to rights of way or other easements to be exercised upon or over the

surface of the adjoining land. Vide 10 C. B. N. S. 268 (E. C. L. R. vol. 100).

The case was argued in the Exchequer Chamber, before Wightman, J., Bramwell, B., Channell, B., Blackburn, J., and Wilde, B.

David Keane (with whom was *Bulwer*), for the plaintiff in error, urged substantially the same arguments which he had presented in the Court below. He cited the following authorities:—Gale on Easements, 3d edit. 198; Viner's Abridgment, *Nusance* (G), pl. 19; Trahern's Case, Godbolt 233; Anonymous, Winch R. 3; Rolle's Abridgment, *Triall*, pl. 23; Roberts *v.* Macord, 1 M. & Rob. 228; 3 Codex, tit. 34 (De Servitutibus), div. 14, par. 1; Baten's Case, 9 Co. Rep. 53 b; Davis *v.* Walton, 8 Exch. 153;† Wright *v.* Williams, 1 M. & W. 77;† Elliotson *v.* Feetham, 2 N. C. 134 (E. C. L. R. vol. 29), 2 Scott 174; Humphries *v.* Brogden, 12 Q. B. 739 (E. C. L. R. vol. 64); Chasemore *v.* Richards, 7 House of Lords Cases 349; and the 2 & 3 W. 4, c. 71, s. 2. [BLACKBURN, J., referred to Moore *v.* Rawson, 3 B. & C. 332 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16). CHANNELL, B., referred to Goodman *v.* Gore, Vin. Abr., *Nusance* (N. 2), pl. 6.]

*842] **Couch* (with whom was *O'Malley*, Q. C.), contrà, was not called upon. *Cur. adv. vult.*

WIGHTMAN, J., now delivered the judgment of the Court:—

We took time for the consideration of this case on account of its novel character. It appears by the finding of the arbitrator to whom the case was referred by order of Nisi Prius, that the plaintiff was the owner and occupier of a windmill built in 1829; that, from the time of its being built, down to 1860, the occupier had enjoyed as of right and without interruption the use and benefit of a free current of air from the west for the working of the mill; that, in the last-mentioned year, 1860, the defendants erected a school-house within twenty-five yards of the mill, and thereby obstructed the current of air which would have come to it from the west, whereby the working of the mill was hindered, and the mill became injured and deteriorated in value. Two cases were cited and mainly relied on for the plaintiff,—one in the 2 Rolle's Abridgment, p. 704, and the other in 16 Viner's Abridgment, tit. *Nusance* (G), pl. 19; but both are shortly stated, and amount to little more than dicta; and it does not appear that they are anywhere else reported, or in what manner or the terms in which such a right was claimed, whether by prescription or otherwise. There is a third case, called Trahern's Case, Godbolt 233, which was the case of a nuisance caused by building a house so near as to hinder the working of the plaintiff's mill; and the judgment of the Court appears in the first instance to have been like that of the case in Rolle's Abridgment, that so much of the house should be thrown down as hindered the working of the mill. But, the plaintiff contending that the whole

*843] *house should be thrown down, the case was adjourned, and no ultimate decision appears to have been given. These are all the authorities which we have been able to find upon the subject.

We agree with the opinion of the Court of Common Pleas, that the right to the passage of air is not a right to an easement within the meaning of the 2 & 3 W. 4, c. 71, s. 2.

The mill was built in 1829, and so the claim cannot be by prescription.

The distinction between easements, properly so called, and the right to light and air, has been pointed out by Littledale, J., in Moore *v.* Rawson, 3 B. & C. 332, 340 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16).

It remains, therefore, to be considered, whether, independently of the statute, the right claimed may be supported upon the presumption of a grant arising from the uninterrupted enjoyment as of right for a certain term of years. We think, in accordance with the judgment of the Court of Common Pleas, and the judgment of the House of Lords in Chasemore *v.* Richards, 7 House of Lords Cases 349, that the presumption of a grant from long-continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant. As was observed by Lord Wensleydale, it was going very far to say that a man must go to the expense of putting up a screen to window-lights, to prevent a right being gained by twenty years' enjoyment. But, in that case, the right claimed, which was the percolating of water underground, went far beyond the case of a window. In the present case, it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty, as *pointed out in the judgment below, that we think it clear that no presumption of a grant, or easement in the nature of a grant, can be raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it. [*844

We are therefore of opinion that the judgment of the Court below should be affirmed.

BLACKBURN, J.—I perfectly concur in the judgment, but wish, for myself, to guard against its being supposed that anything in the judgment affects the common-law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent. I agree with my Brother Willes, in the Court below, that the case of the right to light, before the statute, stood on a peculiar ground. Judgment affirmed.

BLADES *v.* HIGGS and Another. *Feb.* 5.

Held, upon the authority of Rigg v. The Earl of Lonsdale, 1 Hurlst. & N. 923,† affirming the judgment of the Court below,—that the owner of land has a property in game killed thereon by a stranger.

THIS was an action for the conversion of "rabbits and dead rabbits," with a count for an assault. The pleadings and facts are particularly set out in the report below,—12 C. B. N. S. 501 (E. C. L. R. vol. 104),—where the Court held, upon the authority of Rigg *v.* The Earl of Lonsdale, 1 Hurlst. & N. 923,† that the owner of land has a property in game killed thereon. Against this decision the plaintiff

appealed: and the case was argued in the Exchequer Chamber,
*845] before Pollock, *C. B., Martin, B., Blackburn, J., Wilde, B., and Mellor, J.

Hayes, Serjt. (with whom was *Beasley*), for the appellant.—The question is whether a man can have a property in game killed upon his land. The Court of Common Pleas felt themselves bound by the authority of Rigg *v.* The Earl of Lonsdale, 1 Hurlst. & N. 923.† But there there was no plea denying the property in the game, and the question was only incidentally raised. Mr. *Hill*, who was interested in sustaining the affirmative, did not cite a single authority. The real question in issue was, the ownership of the soil,—the right to shoot over it. [MARTIN, B.—The question was, who had a right to the game.] It is submitted that no property exists in wild rabbits, things which are feræ naturæ, until they are actually reduced into possession. If trover were maintainable, an indictment would lie for larceny also. [BLACKBURN, J.—That by no means follows.] In Hale's Pleas of the Crown, p. 510, it is distinctly laid down that larceny cannot be committed of things which are feræ naturæ, though in a park or warren. The Case of Swans, 7 Co. Rep. 15 b, shows, that, in the opinion of Lord Coke, no property can exist in wild animals unreclaimed. In Boulston's Case, 5 Co. Rep. 104 b, it was adjudged, that, "if a man makes coney-boroughs in his own land, which increase in so great number that they destroy his neighbour's land next adjoining, his neighbours cannot have an action on the case against him who makes the said coney-boroughs; for, so soon as the coneys come on his neighbour's land he may kill them, for they are feræ naturæ, and he who makes the coney-boroughs *has no property in them*, and he shall not be punished for the damage which the coneys do in which he has no property, and which the other may lawfully
*846] kill." *[BLACKBURN, J.—That is, when they have got off his land: that is decided.] The like is laid down in Comyns's Digest, *Chase* (D), and in 2 Russell on Crimes 84. Churchward *v.* Studdy, 14 East 249, is an authority in favour of the plaintiff. There, the plaintiff's dogs having hunted and caught, on the defendant's land, a hare started on the land of another, it was held that the property was thereby vested in the plaintiff, who might maintain trespass against the defendant for afterwards taking away the hare. Lord Ellenborough said: "I did not understand at the time the rule was granted, that the plaintiff, through the agency of his dogs, had reduced the hare into his possession: that makes an end of the question. Even though the labourer had first taken hold of it before it was actually caught by the plaintiff's dogs; yet it now appears that he took it for the benefit of the hunters, as an associate of them; which is the same as if it had been taken by one of the dogs." In Fitz. N. B. 87 A, it is said, that, "if a man hunt and take away another man's conies in his close which is no warren, then the form of the writ is, Wherefore, &c., he broke the close of him the said A. at N., and therein without his license and will chased and took and carried away so many conies, of such a price, &c. And by this writ it appeareth that he who hath the land hath no property in the conies." In 2 Bl. Com. 389, it is said: "With regard to animals which have in themselves a principle and power of motion, and (unless particularly con-

fined) can convey themselves from one part of the world to another, there is great difference made with respect to their several classes, not only in our law but in the law of nature and of all civilized nations. They are distinguished into such as are domitæ, and such as are feræ naturæ: some being of a *tame*, and others of a *wild* disposition. In such as *are of a nature tame and domestic (as horses, kine, sheep, [*847 poultry, and the like), a man may have as absolute a property as in any inanimate beings(!); because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement; in either of which cases the owner does not lose his property: in which our law agrees with the laws of France and Holland. The stealing or forcible abduction of such property as this is also felony; for these things are of intrinsic value, serving for the food of man, or else for the uses of husbandry. But, in animals feræ naturæ, a man can have no absolute property." Again, p. 391, it is said: "A qualified property may subsist in animals feræ naturæ, per industriam hominis, by a man's reclaiming and making them tame by art, industry, and education; or by so confining them within his own immediate power that they cannot escape and use their natural liberty. Such as are deer in a park, hares or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man than while they continue in his keeping or actual possession; but, if at any time they regain their natural liberty, his property instantly ceases; unless they have animum revertendi, which is only to be known by their usual custom of returning,—a maxim which is borrowed from the Civil law, 'revertendi animum videntur desinere habere tunc, cum revertendi consuetudinem deseruerint.'" [WILDE, B.—All that deals with the property in the animals when alive: the question here is, in whom is the property when they are killed. BLACKBURN, J.—In Lord Lonsdale *v.* Rigg, 11 Exch. 679,† Platt, B., says: "Here, the grouse being pursued and killed within Bretherdale Bank (if I am *right in saying it was the lord's soil alone), [*848 the possessory right was in the plaintiff, and, when the grouse fell, the property was complete in him." The question is whether that is correct.] It is inconsistent with the decision in Churchward *v.* Studdy, 14 East 249. [BLACKBURN, J.—I think not. Nor is anything you have cited necessarily inconsistent with the doctrine of Lord Holt in Sutton *v.* Moody, 1 Ld. Raym. 250.] All the legislation upon the subject assumes that there is no property in game down to the moment of its being killed: and then all the authorities show that it becomes the property of the person killing it, who first reduces it to the state of property. In Sutton *v.* Moody, the question arose after verdict, when every intendment would be made to sustain the finding. So also in Polexfin and Ashford *v.* Crispin, 1 Vent. 122, and Child *v.* Greenhill, Cro. Car. 553. After all, the passage relied on in Sutton *v.* Moody is a mere dictum of Lord Holt: and, however eminent a lawyer that learned Judge might have been, his dictum is not to be opposed to a long and uniform current of authorities. Chief Baron Comyns,—Com. Dig. *Biens* (F.),—makes no distinction between absolute and qualified property. Bayley, J., in his elaborate judg-

ment in Hannam *v.* Hockett, 2 B. & C. 934, 939 (E. C. L. R. vol. 9), 4 D. & R. 518 (E. C. L. R. vol. 16), says,—"Even with respect to animals feræ naturæ, though they be fit for food, such as rabbits, a man has no right or property in them,"—referring to Boulston's Case, already cited.

Merewether (with whom was *Macaulay*, Q. C.), contrà, was not called upon.

POLLOCK, C. B.—I am of opinion that the judgment of the Court of Common Pleas should be affirmed. Indeed, it is not in my judg-
*849] ment competent to us to *do anything but affirm it, seeing that there is a decision of this Court which is directly in point, viz., in the case of Rigg *v.* The Earl of Lonsdale, 1 Hurlst. & N. 923.† It may be that the point was not there argued at any very great length, but was rather taken for granted. In the Court below it was decided upon the ground put by Lord Holt in Sutton *v.* Moody, 1 Lord Raym. 250,—which is the very point now in issue,—and not upon the point suggested by my Brother *Hayes*. And the Court of error decided on the same ground. The judgment therefore must be affirmed.

MARTIN, B.—I am of the same opinion. I can assure my Brother *Hayes* that this matter underwent the fullest investigation in The Earl of Lonsdale *v.* Rigg, 11 Exch. 654,† and Rigg *v.* The Earl of Lonsdale, 1 Hurlst. & N. 923:† and in my opinion the judgment there pronounced is in conformity with common sense, and ought to be sustained.

BLACKBURN, J.—I am of the same opinion. At the beginning of his judgment in The Earl of Lonsdale *v.* Rigg, in the Court below, my Brother Martin says: "It was observed in the argument that there was no plea denying the plaintiff's property in the grouse mentioned in the second count. This was clearly an oversight in the defendant's pleader; and it was stated by the learned counsel for the plaintiff that it was his object to obtain a judgment upon the right, and that the property in the dead grouse might be considered as traversed by the plea of not guilty." The learned Judge, therefore, in the beginning of his judgment, plainly points out that one question to be considered, was, in whom was the property in the dead grouse. He then goes on at p. 671 of the 11th Exchequer to argue the question on the peculiar
*850] right in animals of *a wild nature. He says: "The property in wild grouse is not absolute in any one: it is a wild bird, feræ naturæ. So long as the grouse is upon a man's land, he has a possessory property in it; but, as soon as it flies or goes off his land, his property is gone. Lord Holt thus expresses himself in Sutton *v.* Moody, 1 Lord Raym. 250,—'If a man keep conies in his close (as he may), he has a possessory property in them so long as they abide there: but, if they run into the land of his neighbour, *he* may kill them, for then *he* has the possessory property.' And his Lordship adds,—'If A. start a hare on the ground of B., and hunt it and kill it there, the property continues all the while in B. But, if A. start a hare on the ground of B., and hunt it into the ground of C., and there kill it, the property is in A., the hunter, although he is liable to actions of trespass to the lands both of B. and C.:' and this view of the law was adopted by the Court of King's Bench in Churchward *v.* Studdy, 14 East 249. The right at common law, therefore, to such

animals is very peculiar. So long as they remain upon a man's land, they belong to him, but the moment they leave his land his property is gone; and this is so, even if they be hunted out of his land by a trespasser, and although they be killed by the trespasser on another man's land: the continued pursuit gives the property in the animals to the trespasser, in exclusion of the person in whose land they are killed. If grouse, therefore, belong to the person who is in possession of the land where they are, the real question in this present case is, who is in possession of the land and soil of Bretherdale Bank?" Platt, B., at p. 679, says: "Nobody can doubt that trover would lie for dead grouse, or that an indictment would lie for stealing a quantity of grouse from a poulterer's. Now, applying the doctrine laid down in Sutton *v.* Moody, 1 *Lord Raym. 250, by Lord Holt, that, where a man pursues game in B.'s land, and kills it in B.'s [*851 land, the bird or the deed that is killed is the property of B., since he has a possessory though not an absolute right in it while it is upon his domain,—here, the grouse being pursued and killed within the Bretherdale Bank (if I am right in saying it was the lord's soil alone), the possessory right was in the plaintiff, and, when the grouse fell, the property was complete in him." Then, at p. 682, Alderson, B. (who with the Lord Chief Baron differed from Platt, B., and my Brother Martin, upon the other point), says: "As to the second point, I do not believe that we entertain any difference of opinion. There is no claim of free-warren set up by the plaintiff. The property in grouse shot by the defendant is not, therefore, by anything stated in this case shown to be in the plaintiff, which is the point in issue, unless the plaintiff is himself solely entitled to the right in the land." That learned Baron, therefore, clearly makes it part of his judgment that the property in the grouse depends on the property in the land. And the Chief Baron concurs in that view. All the four Judges in the Court below, therefore, give a direct judgment upon the point. Then, when the case comes before the Court of error, the matter is not passed by in silence. At the close of the judgment the point is distinctly mentioned in language which shows that the Court had considered it. They say: "The grouse shot on the land of the plaintiff belonged to him, according to all the authorities, and so the second count is sustained." I must confess I see no reason for saying that that is not a right conclusion. At all events, when we have a solemn judgment of the Exchequer Chamber expressly in point, we cannot depart from it, but must leave it to be corrected, if erroneous, by the House of Lords.

*WILDE, B.—I wish to add a few words, as I think the doctrine of animals feræ naturæ has in modern times been some- [*852 times pushed too far. It has been argued in this case that an animal feræ naturæ could not be the subject of iudividual property. But this is not so; for, the common law affirmed a right of property in animals even though they were feræ naturæ, if they were restrained either by habit or enclosure within the lands of the owner. We have the authority of Lord Coke's Reports for this right in respect of wild animals, such as hawks, deer, and game, if reclaimed, or swans or fish, if kept in a private moat or pond, or doves in a dove-cote. But the

right of property is not absolute; for, if such deer, game, &c., attain their wild condition again, the property in them is said to be lost.

The principle of the common law seems, therefore, to be a very reasonable one; for, in cases where either their own induced habits or the confinement imposed by man have brought about in the existence of wild animals the character of fixed abode in a particular locality, the law does not refuse to recognise in the owner of the land which sustained them a property co-extensive with that state of things. When these principles were applied to a country of few enclosures, as in old times, the cases of property in game would be few. But the enclosures and habits of modern times have worked a great change in the character of game in respect of its wildness and wandering nature: and there is a vast quantity of game in this country which never stirs from the enclosed property of the proprietor by whose care it is raised and on whose land it is maintained.

It is, I think, too late now for the Courts of law to meet this change of circumstances by declaring a property in *live* game; but, if the *853] legislature should *interfere, as was suggested in argument, by giving to the owner of land a property in game, either absolute or qualified, so long as it remained on his land, it would only be acting in the spirit and policy of the common law.

MELLOR J., concurred. Judgment affirmed.

The Company of FREE FISHERS AND DREDGERS OF WHITSTABLE, in the County of Kent, *v.* GANN. *Feb.* 7.

By deeds of lease and release of the 11th and 12th of October, 1791, the manor of Whitstable, and the royalty of fishery or oyster-dredging within the said manor, were conveyed to E. F. and J. S. By deeds of lease and release of the 24th and 25th of October, 1792,—reciting, amongst other things, that, within the said manor of Whitstable, there was, and for many hundred years then last past had been, a fishery for the growth and improvement of oysters, extending from the sea-beach for a very considerable distance into the sea, managed by a company of free dredgers called "The Whitstable Company of Dredgers,"—the *manor* (proper) was limited to E. F., J. N., and S. S., in fee, and "the royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or the landing of any goods or merchandise within the said manor," &c., to T. F., in fee, on behalf of the company.

By an act of 33 G. 3, c. 42, the Whitstable Company of Dredgers were incorporated by the name of "The Company of Free Fishers and Dredgers of Whitstable;" and, in pursuance of that act, the fishery, and all rights appertaining thereto, were by deeds of lease and release of the 4th and 5th of ———, 1793, conveyed to the Company.

It appeared in evidence that the oyster-fishery extended about two miles from the shore, and far below the ordinary low-water mark; and that the Company and those under whom they claimed had so far back as the year 1775 claimed a toll of 1*d.* from every vessel anchoring or grounding within the space covered by their conveyance: and three instances were proved of the claim having been enforced by distress from vessels anchoring on the oyster ground below low-water mark, when resisted,—there being no evidence to show that the claim had ever been resisted without recourse being had to a distress:—

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that, it being competent to the Crown to grant the soil of the sea-shore and the right to receive anchorage from vessels anchoring there (otherwise than in case of necessity arising from distress), the evidence was sufficient to justify the presumption of a grant having a legal origin; that the right to distrain was incident to the right to the anchorage; and that this right was not lost or destroyed by the severance of the marine from the terrestrial part of the manor in 1792.

THIS was an appeal against a decision of the Court of Common Pleas in an action brought by the plaintiffs, a Company incorporated by the 33 G. 3, c. 42, under *the name of "The Company of [*854
Free Fishers and Dredgers of Whitstable, in the county of Kent," to try their right to receive a payment of 1*s.* for every vessel anchoring on certain land covered by the sea, the soil of which was claimed by the plaintiffs.

The material facts upon which the plaintiffs based their claim were as follows:—By deeds of lease and release of the 11th and 12th of October, 1791, the manor of Whitstable, and the royalty of fishery or oyster-dredging within the said manor, were conveyed to Edward Foad and James Smith. By deeds of lease and release of the 24th and 25th of October, 1792,—reciting, amongst other things, that, within the said manor of Whitstable, there was, and for many hundred years then last past had been, a fishery for the growth and improvement of oysters, extending from the sea-beach for a very considerable distance into the sea, managed by a Company of free dredgers called "The Whitstable Company of Dredgers,"—the *manor* (proper) was limited to Edward Foad, John Nutt, and Stephen Salisbury, in fee, and "the royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or the landing of any goods or merchandise within the said manor," &c., to Thomas Foord, in fee, on behalf of the Company.

By an Act of 33 G. 3, c. 42, the Whitstable Company of Dredgers were incorporated by the name of "The Company of Free Fishers and Dredgers of Whitstable;" and, in pursuance of that Act, the fishery, and all rights appertaining thereto, were, by deeds of lease and release of the 4th and 5th of ———, 1793, conveyed to the Company.

*It appeared in evidence that the oyster-fishery extended [*855
about two miles from the shore, and far below the ordinary low-water mark; and that the Company and those under whom they claimed had so far back as the year 1775 claimed a toll of 1*s.* from every vessel anchoring or grounding within the space covered by their conveyance: and three instances were proved of the claim having been enforced by distress from vessels anchoring on the oyster-ground below low-water mark, when resisted,—there being no evidence to show that the claim had ever been resisted without recourse being had to a distress.

The Court of Common Pleas held, that, it being competent to the Crown to grant the soil of the seashore and the right to anchorage, the evidence was sufficient to justify the presumption of a grant having a legal origin; that the right of distress was incident to the right to the anchorage; and that the right to the anchorage was not destroyed by the severance of the marine from the terrestrial part of the manor: vide 11 C. B. N. S. 387 (E. C. L. R. vol. 103).

The appeal was heard in the Exchequer Chamber on the 28th of November last, before Pollock, C. B., Wightman, J., Channell, B., Blackburn, J., and Mellor, J.

Prentice (with whom was *Hawkins*, Q. C.), in support of the appeal, submitted that the right claimed could not have had a legal origin, for that there could be no such thing as a grant of a right to a toll for anchoring on the high sea, unless it could be shown that the grantee, as a consideration for the grant, had afforded some countervailing advantage to the Crown for the benefit of the public, as, by constructing a harbour or the like; that, if the right could exist, it
*856] was destroyed by the severance of the manor in 1792; *and that, at all events, there was no power to distrain. He referred to Callis on Sewers 49, 53, 3 Kent's Commentaries 427, Hale de Jure Maris 36, Hale de Portibus Maris 15, 46, 74, Chitty's Prerogative of the Crown 143, 194, Phear on Rights of Water 44, 46, 53, 79, Scriven on Copyholds 9, Comyns's Digest, *Toll* (C.), Warren *v.* Prideaux, 1 Mod. 104, The Mayor of Nottingham *v.* Lambert, Willes 111, Lord Pelham *v.* Pickersgill, 1 T. R. 660, The Attorney-General *v.* Burridge, 10 Price 350, Jenkins *v.* Harvey, 1 C. M. & R. 893,† The Mayor of Exeter *v.* Warren, 5 Q. B. 773 (E. C. L. R. vol. 48), Dav. & Meriv. 524, and The Mayor of Colchester *v.* Brooke, 7 Q. B. 309 (E. C. L. R. vol. 53). He further submitted that Gann, as a member of one of the Cinque Ports, was exempt from toll by virtue of the charter of Edward 4, set out in Jeake's Charters, p. 6, and cited Comyns's Digest, *Franchises* (E.).

Lush, Q. C. (with whom was *G. Denman*, Q. C.), contrà, urged the same arguments, and referred to the same authorities as were urged and referred to in the Court below. *Cur. adv. vult.*

MELLOR, J., now delivered the unanimous judgment of the Court.

During the argument in this case we intimated our opinion that the defendant could not claim exemption from the payment of the anchorage due under the Charter of Edward 4, as such anchorage due, if legal, must have had its origin in a grant from the Crown of the bed of the sea before the time of legal memory, and consequently anterior to the charter under which the exemption was claimed.

As to the other questions raised in the case, it was scarcely disputed that they must be decided in favour of the plaintiffs.

*857] *The only question which was argued at length is a very important one; and with regard to it the authorities to be found in our books are not very direct or clear. Mr. *Prentice* contended, that, although the bed of the sea where the claim arose was at one time the property of the Crown, and might possibly have been granted to a subject before Magna Charta, yet that it could only have been lawfully granted subject to the paramount right of navigation, of which anchorage is a necessary incident,—unless it could be shown that the grantee, as a consideration for the grant, had afforded some countervailing advantage to the Crown for the benefit of the public.

That, before Magna Charta, the King could have granted not only the shore of the sea to a subject, but also the bed of the sea itself in what Lord Chief Justice Hale calls "districtus maris," we think cannot now be doubted: Hale de Jure Maris, Cap. 6, pp. 31, 32. The authority of Lord Hale as to this matter has on several occasions been recognised and adopted by Judges of the greatest eminence: see the judgment of Holroyd, J., in Blundell *v.* Caterall, 5 B. & Ald. 293 (E. C. L. R. vol. 7).

There may be, and we think that there is, a distinction between the

shore, or "littus maris," and the bed of the sea, with reference to the modes in which a subject may have acquired proprietary rights therein as well as in the nature and extent of the rights so acquired. It may, we think, be admitted, that there is a paramount right of navigation in the sea, in arms of the sea, and in navigable rivers, and that any grant by the Crown of any portion of the bed of the sea, or of the soil of arms of the sea or of navigable rivers, must be subject to this paramount right (Williams *v.* Wilcox, 8 Ad. & E. 328 (E. C. L. R. vol. 35), 3 Nev. & P. 606; The Mayor of Colchester *v.* Brooke, 7 Q. B. 373 (E. C. L. R. vol. 53); The Mayor of Nottingham *v.* Lambert, Willes 111): and, although a subject may *by prescription [*858
have a wear in the sea, yet if it be a nuisance to the passage of ships, it may be abated. "The people have a public interest, a jus publicum, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions:" Hale de Jure Maris 36. And the law as to this right of navigation is laid down by Holroyd, J., in Blundell *v.* Caterall, in these terms: "By the common law, all the King's subjects have in general a right of passage over the sea with their ships, boats, and other vessels, for the purposes of navigation, trade, and intercourse, and also in navigable rivers; and they have also primâ facie a common of fishery there; but they may be excluded from the latter right, though not now by charter, at least by immemorial custom or prescription. These rights are noticed by Lord Hale: but whatever further rights, if any, they may have in the sea or in navigable rivers, it is a very different question whether they have, or how far they have, independently of necessity or usage, public rights upon the shore (that is to say, between the high and low-water mark), when it is not sea or covered with water, and especially when it has from time immemorial been, or has since become, private property." Now, although in this passage the reference to the rights of the public in the shore is confined to the point between high and low-water mark, and where it is not sea, still it gives, we think, the rule with reference to the right of anchorage as an incident to navigation in such portions of the bed of the sea as have been granted to a subject.

Any person navigating a vessel may, if compelled by reasonable necessity arising from stress of weather, or similar cause, drop his anchor in any part of the bed of the sea: but we do not think that such a right is inconsistent with a claim to an anchorage due in *any case in which a navigator, *of his own will, and without* [*859
necessity, anchors in the bed of a "districtus maris" like that in question. It is true, that in the Anonymous Case reported in the note to p. 517 of 1 Campbell, Wood, B., is said to have directed the jury, that "a navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please. Nevertheless, if they abuse that right so as to work a private injury, they will be liable to an action."

This certainly appears to be inaccurately expressed, if it means that the right to unload or to moor in a navigable river is absolute and independent of any licence or compensation in respect thereof.

Anchorage is defined by Lord Hale,—De Portibus Maris 74,—to be "a prestation or toll for every anchor cast there; and sometimes though there be no anchor. And this doth in truth properly and

primâ facie arise from or in respect of the propriety in the soil, and is an evidence of it: but yet is not so always, but grows due in respect of the franchise."

In the Mayor of Colchester *v.* Brooke, 7 Q. B. 355 (E. C. L. R. vol. 53), Coltman, J., in directing the jury, is reported to have said: "It may be law, according to the ancient custom of the place, that a party may be liable, if he takes the ground, to make a reasonable payment to the owner of the soil. If the ground belongs to these parties, they very properly enforced payment if a vessel took ground, *such payment being sanctioned by ancient custom.*"

If the authorities establish, as we think they do, that the soil in the bed of the sea, in a creek or haven, arm of the sea, or "districtus maris," might have been granted to a subject, it seems to follow that
*860] any dropping of an anchor not occasioned by reasonable *necessity, but voluntarily, in the bed of the sea so granted, would entitle the owner to compensation for the breaking of his soil. If that be so, what objection is there in principle to that compensation being fixed and determined and made uniform by custom or grant, as in the case of stallage or piccage in a market, to which all the public have a right to resort, but, if they require to erect stalls, must make compensation to the owner of the soil? See The Mayor of Northampton *v.* Ward, 1 Wils. 114; Comyns's Digest, *Market.*

Toll paid to the owner of a port is perhaps not strictly analogous to the due claimed by the plaintiffs, inasmuch as the duty of repair may be deemed to be a consideration for it. So, in the case of toll-thorough, which is a sum demanded for passage on a highway, to support which a consideration is necessary. But toll-traverse, which is a sum demanded for passage over the private soil of another, appears to be a claim of the same character with that demanded in the present case. In the case of The Mayor of Nottingham *v.* Lambert, Willes 111, the judgment of the Court is based on this distinction; and accordingly a prescription to take toll for passing along the navigable river Trent, through the manor of Nottingham, was held bad,—"For, how can a duty be imposed on all the subjects of England only for enjoying that privilege which is their inherent birthright, and which every subject had a right to before? If, indeed, they receive any particular benefit, as, going over a bridge, coming into a quay, wharf, port, *or the like*, this indeed may alter the case; but then this must be particularly shown."

Had the claim under consideration been in respect of passage over the locus in quo, it is clear that the prescription could not have been supported: but it appears to us that the defendant did receive a parti
*861] *cular benefit by anchoring there, and that there is nothing unreasonable or against common right in sustaining the prescription in the present case. We think, that, after so long a period of enjoyment, it is the duty of the Court to hold it valid, unless we can see some valid reason against it, either upon principle or authority.

We are, therefore, of opinion that the plaintiffs are entitled to the customary payment, and that the judgment of the Court below was right, and must be affirmed. Judgment affirmed.(a)

(a) Gann *v.* Johnson, was also affirmed.
See this subject very ably discussed in Hall on the Rights of the Crown.

RICHARDS and Another *v.* DAVIES, Clerk. *Feb.* 5.

The testator by his will, dated before the passing of the Wills Act, 7 W. 4 & 1 Vict. c. 26, devised property to trustees and their heirs, to the use of his daughter Ann James for life, and, after her decease, in trust for such one or more of her *children*, or his, her, or their issue, in such manner and form, &c., as Ann James should by will appoint; and, in default of appointment, "in trust for all and every her *children*, and the heirs of their body or bodies lawfully begotten, in equal shares and proportions." The testator then proceeded,—"And in case of the death of my daughter Ann James without leaving any child her surviving, and in the event of such *child* or *children* her surviving and dying without leaving any issue of his or her body, then in trust for my own right heirs for ever."

Ann James had a son who died in her lifetime, having previously joined with her in the execution of a disentailing deed:—

Held,—affirming the judgment of the Court of Common Pleas,—that the son of Ann James took a vested estate-tail under the will, and consequently that the ultimate limitation to the right heirs of the testator was barred by the disentailing deed.

THIS was a writ of error upon a decision of the Court of Common Pleas upon the special case set out, ante, p. 69.

The testator by his will, dated before the passing of the Wills Act, 7 W. 4 & 1 Vict. c. 26, devised property to trustees and their heirs, to the use of his daughter Ann James for life, and, after her decease, in trust for *such one or more of her *children*, or his, her, or their issue, in such manner and form, &c., as Ann James should [*862 by will appoint; and, in default of appointment, "in trust for all and every her *children*, and the heirs of their body or bodies lawfully begotten, in equal shares and proportions." The testator then proceeded,—"And in case of the death of my daughter Ann James without leaving any child her surviving, and in the event of such *child* or *children* her surviving and dying without leaving any issue of his or her body, then in trust for my own right heirs for ever."

Ann James had a son who died in her lifetime, having previously joined with her in the execution of a disentailing deed.

The Court of Common Pleas held that the son of Ann James took a vested estate-tail under the will, and consequently that the ultimate limitation to the right heirs of the testator was barred.

The case was argued in the Exchequer Chamber before Pollock, C. B., Crompton, J., Martin, B., Blackburn, J., Wilde, B., and Mellor, J., by

Tripp (with whom was *J. W. Smith*), for the plaintiff in error.—He contended, as was contended in the Court below, that the will gave to Thomas Davies James, the son of Ann James (through whom the defendant claimed), only a contingent and not a vested estate-tail.

Mellish, Q. C., contrà (with whom were *Sir T. Phillips* and *Lovell*), for the defendant, were not called upon.

POLLOCK, C. B.—I am of opinion that the judgment of the Court of Common Pleas should be affirmed. The opinion of my Brother Williams certainly contains *matter deserving of great attention. But I think it is extremely improbable that the testator [*863 meant, that, in the event of his daughter Ann James's children dying leaving children, these grandchildren should be excluded from all participation in his estate, when he had particularly provided that Ann James might by her will appoint the estate to her own children *or their issue*. To construe the will, therefore, as meaning, that, in

the event of Ann James's children dying in the lifetime of their mother, leaving issue, such issue should be excluded from all participation, is, I think, obviously inconsistent with the general intention of the will. I therefore think the judgment should be affirmed for the reasons assigned in the Court below, and particularly those assigned by my Brother Williams.

MARTIN, B.—I am of the same opinion. The construction of this will seems to me to be perfectly clear. The testator gives to his daughter Ann James an estate for life, and, after her decease, subject to a power of appointment, which is not exercised, "to all and every of her children, and the heirs of their body or bodies lawfully begotten, in equal shares and proportions;" and then there is a devise over to the right heirs of the testator. There cannot be a clearer gift of an estate-tail. Ann James had a son, Thomas Davies James, who attained the age of twenty-one. That son would take an estate-tail to him and the heirs of his body, expectant on the determination of the life-estate of his mother. If the will had stopped there, the remainder would have gone to the right heirs of the testator. But he thinks fit to go on,—"and, in case of the death of my said daughter Ann James without leaving any child her surviving, *and* in the event of such
*864] child or children her surviving and dying without leaving *any issue of his or her body, then in trust for my own right heirs for ever." How is it possible that that can cut down the previous estate-tail? With the greatest possible deference for the doubts expressed by Mr. Justice Williams, I must own I think it a very clear case.

The rest of the Court concurring, Judgment affirmed.

NEWTON and Others *v.* CUBITT and Others. *Feb.* 5.

Affirmance of judgment of the Court of Common Pleas.

UPON a special case stated for the opinion of the Court of Common Pleas in an action for an alleged infringement by the defendants of the plaintiffs' right of ferry between the Isle of Dogs and Greenwich, that Court held that the evidence disclosed in the case established only a right of ferry from Potter's Ferry Stairs to Greenwich, and not from the whole of the Isle of Dogs, as claimed by the plaintiffs, and (although the defendants might occasionally have carried a person who came from Poplar) did not show an actionable disturbance of the plaintiffs' ferry: 12 C. B. N. S. 32 (E. C. L. R. vol. 104).

A writ of error was brought upon that judgment; but the Court of error, without hearing any argument on the part of the defendants, affirmed the judgment of the Court below.

Judgment affirmed.

WILLES *v.* WALLINGTON, Clerk of the Local Board of Health of LEAMINGTON. *Feb.* 5. [*865

Affirmance of judgment of the Court of Common Pleas in Wallington, app., White, resp., 8 C. B. N. S. 138 (E. C. L. R. vol. 98).

THIS was an action brought to try the validity of an order of certain justices made in the exercise of their summary jurisdiction under the Public Health Act, 1848, 11 & 12 Vict. c. 63.

A special case having been stated for the opinion of the Court of Common Pleas, for the purpose of questioning the decision of that Court upon a case on appeal from the justices (setting out precisely the same facts), holding that the respondents were liable to be rated, that Court gave judgment pro formâ for the defendant.

A writ of error was thereupon brought, and the case was argued in the Exchequer Chamber before Pollock, C. B., Wightman, J., Bramwell, B., Channell, B., and Blackburn, J., by *Quain*, for the plaintiff in error, and by *H. Lloyd*, for the defendant in error.

The arguments in the Court of error were substantially a repetition of those urged upon the argument of the appeal case in the Court below.

Per CURIAM. Judgment affirmed.

*MEMORANDUM. [*866

THE following cases, reported in this volume, have since been heard and disposed of on appeal in the Exchequer Chamber:—

Ormson *v.* Clarke, p. 337,—Judgment affirmed.

Xenos *v.* Wickham, p. 381,—Judgment affirmed.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

IN THE HOUSE OF LORDS.

[Before the LORD CHANCELLOR (Lord WESTBURY), Lord CRANWORTH, Lord CHELMSFORD, and other Lords.]

BLADES *v.* HIGGS.—*May* 16 and 18, and *June* 13.(*a*)

If a trespasser finds and kills game upon the land, or within the franchise of A., the qualified property which A. had in such game when alive, ratione soli or ratione privilegii, becomes absolute in A., and not in the trespasser; and such absolute property in the dead game remains in A., even if the trespasser finds, kills, and carries it off the land in one continuous act.

Lord Holt's third proposition in Sutton *v.* Moody, 1 Ld. Raym. 250 disapproved of by Lord Chelmsford.

THIS was an appeal from a decision of the Court of Exchequer Chamber (reported 13 C. B. N. S. 844 (E. C. L. R. vol. 105), 9 Jur. N. S. 1040), affirming a judgment of the Court of Common Pleas (reported 12 C. B. N. S. 501 (E. C. L. R. vol. 104), 8 Jur. N. S. 1012). This case is also reported 7 Jur. N. S. 1289.

The question for decision was, whether game found, killed, and taken upon the land of A. by a trespasser, became the property of A., as much as if it had been found, killed, and taken by A., or by his authority.

The facts, according to the statement of the case for the purposes of the appeal to the Court of Exchequer Chamber, were as follows:—

"William Blades, the plaintiff (and appellant) is a fishmonger and licensed dealer in game at Stamford, in the county of Lincoln, and the defendants (and respondents) William Higgs and Thomas Percival, are, the former the steward, and the latter a servant, in the employ of the Marquis of Exeter. Between seven and eight o'clock on the morning of the 16th October, 1860, the plaintiff bought of a man, named Yates, two bags, containing about ninety rabbits, and ordered them to be consigned to him at the Midland station at Stamford. The plaintiff, upon the purchase, paid 4*l.* 15*s.* for the rabbits. At four minutes before nine the same morning the plaintiff went to the Midland station with a barrow, for the purpose of bringing the rabbits away to his shop. The bags arrived, directed to the plaintiff, with one of his own printed labels, and the plaintiff paid 4*s.* for the carriage of them to Stamford, and they were delivered to him. As he was

(*a*) 4 Jur. N. S. 701; 34 L. J. C. P. 286.

proceeding to put the two bags in the barrow, and before he had got them on, the defendant Higgs came up to the plaintiff and said he wanted to see what was in the bags, to which the plaintiff said he should not allow him; and, with the assistance of a porter, the plaintiff lifted the bags in the barrow. The defendant Higgs remained there until two policemen came, and then he directed them to see what the bags contained. The plaintiff said he might. One of the policemen looked into them, and seeing that they contained dead rabbits, he allowed the plaintiff to take them, and assisted him in putting them back on the barrow. The other defendant Percival then came up, and said, 'I shall take these rabbits; they are mine;' and the defendant Higgs said also, They are the Marquis of Exeter's.' The defendants then attempted to get possession of the bags, and the plaintiff resisted for some time, until at length—one of the policemen saying to him it was no use his struggling any longer—he discontinued his resistance, and the defendants took possession of the bags and their contents. Another gamekeeper in the town, called Pollard, was fetched to the spot to buy the rabbits, and they were sold to him by the defendants, the plaintiff protesting against the sale of his property. The two bags were directed to the plaintiff, and had been sent from the Kelton station, on the Midland Railway."

On the 18th October, 1860, an action was brought in the Court of Common Pleas by the plaintiff against the defendants for the conversion of the plaintiff's rabbits, and also for assaulting him, and taking them from him by force.

The defendants pleaded, that they were not guilty, and that the rabbits were not the plaintiff's; and they pleaded further, a justification of the assault to get the rabbits from the appellant, as being rabbits belonging to their master, the Marquis of Exeter; and issue was joined upon those pleas, which came on to be tried at Nisi Prius, before Mr. Justice Willes, at the Summer Assizes for Leicester in 1861.

At the trial, the counsel for the defendants proposed to prove on their behalf, that the person who transmitted the rabbits to the plaintiff went upon the Marquis of Exeter's land, and took the rabbits, and killed them, and put them into the bags there, and then carried them to the railway station at Kelton; and they contended that the property in the rabbits was in Lord Exeter, and that the defendants, acting under his authority, were justified in the course they adopted. Mr. Justice Willes, however, ruled that such evidence would not prove the rabbits to be the property of Lord Exeter; and in the course of his remarks said, "I never could see the distinction between the pheasant preserved and fed on my land and the barn-door family; but there is that distinction in the law, and I am bound to administer the law as it is. The whole theory of the game laws is founded on there being no permanency in property of this description. The doctrine has been followed as laid down in Coke upon Littleton. A person entering on your land, and taking the thing out of or off the land, is no doubt a trespasser. The proofs may be as large as the defendant's wish; but if a person kills a rabbit or ninety rabbits on Lord Exeter's grounds, and goes off and sells them to a fishmonger, then Lord Exeter's people have no right to go to the fishmonger's, and take

them from him, as coming out of Lord Exeter's grounds. The right would be in the person taking them, though taken by trespass, and he is only subject to the game laws, and not to the ordinary rules of property. Suppose he kills the ninety rabbits, and puts them into his bag, it is not like felling a tree, and coming back for it; it is all done there and then." The learned Judge then directed the jury as follows:—"If the rabbits were the property of Lord Exeter at the time, the defendants would have had a right to take them; but were they Lord Exeter's? The learned counsel for the defendants say he takes them to have been so, and that he would show that certain poachers were in Lord Exeter's grounds, and took the ninety rabbits, and sent them away from Kelton to Stamford; and therefore they were that nobleman's property, and he had a right, by the hands of his servants, to take them back. That depends upon whether, if a person goes on the property of another, and takes wild rabbits, and kills them there, they are to be recovered back. I think not. The learned counsel for the defendants suggests the law is the other way, and he has suggested a passage from a book of repute by which he thinks he is supported; but certainly the bent of my opinion is too strong, and has existed too long a time, to enable me to come to that conclusion, or to induce me to have any doubt about it. My notion is, that a person who kills wild animals, such as rabbits, is liable to a trespass, at the instance of the owner of the ground where he kills the game, under what are called the game laws. I repeat, I never could understand why such a law should exist, because, if a man has land, and chooses to rear pheasants and what not upon it, and goes to the labour and expense of having them preserved, and of feeding them at much more cost than a farmer's barn-door fowls, I never could understand why the law as to larceny did not apply as to that. According to all principle and reason, they should belong to the man who created the property, just as much as a cock and hen. The sum and substance of it is, in point of law, I rule, that the plaintiff was entitled to the rabbits, and that the defendants were not entitled to take them from him."

The jury accordingly found a verdict for the plaintiff, with 6*l.* 10*s.* damages.

In the following Michaelmas Term the defendants obtained a rule nisi from the Court of Common Pleas for a new trial, "on the ground that the Judge presiding at the trial misdirected the jury, in telling them that the facts relied upon by the respondents, if taken as proved, did not constitute evidence that the right to the possession of the rabbits was in the Marquis of Exeter." This rule was made absolute by the Court of Common Pleas, on the 7th February, 1862 (8 Jur. N. S. 1012), who considered the case was concluded by the decision of the Court of Exchequer Chamber, in Lonsdale *v.* Rigg, 1 H. & Norm. 925.†

Against this judgment the plaintiff appealed to the Court of Exchequer Chamber, who, upon the same grounds, affirmed the judgment of the Court below (9 Jur. N. S. 1040).

The plaintiff now appealed to the House of Lords.

Hayes, Serjt., and *Beasley*, for the appellant, contended that he became lawfully possessed of the dead rabbits, by purchase from the persons who had reduced them into possession; that the property in the rabbits was in him, and he was entitled to recover; and that the

respondents could not claim the property in the rabbits against him on behalf of Lord Exeter, by showing that they had been taken and killed upon Lord Exeter's land. They maintained that the property in wild rabbits or other animals, feræ naturæ, was in the person who reduced them into possession, and not in the person upon whose lands they might happen to be, and that until reduced into possession they were nullius in bonis. The owner of the land, they argued, has no absolute property in animals feræ naturæ whilst they are alive; he has merely the right of prior capture, and the right to exclude other persons from his land. By the civil law the person who, although a trespasser, takes or reduces into possession any animal feræ naturæ, acquires the property in it: Just. Inst., lib. 2, tit. 1, cl. 12; Brac. lib. 2, tit. 1; Com. Dig., tit. *Biens* (F.); Case of Swans, 7 Rep. 15 b, 17 b; F. N. B. 87; Mallocke *v.* Easley, 3 Lev. 227; Fines *v.* Spencer, 3 Dy. 306 b; Boulstone's Case, 5 Rep. 105; 2 Bl. Com., by Sweet, 389; Hannam *v.* Mockett, 2 B. & Cr. 934; Churchward *v.* Studdy, 14 East 249. In this case, then, these rabbits were not the absolute property of Lord Exeter when they were alive, neither were they killed by him or by his authority; they, therefore, became the property of the person who killed them, *i. e.*, the trespasser. If game killed by a poacher is the property of the owner of the soil, every poacher who kills and takes game, is guilty of larceny; which is not the case: 2 Russ. Crimes 84; Rough's Case, 2 East's P. C., c. 16, s. 41, p. 607. The late Game Act, moreover, shows that the Legislature does not consider the game found in the possession of a poacher is the property of the owner of the soil whereon it was killed, for that Act (25 & 26 Vict. c. 114, s. 2) authorizes such game to be sold for the benefit of the county or borough. The other side will rely on Sutton *v.* Moody, 1 Ld. Raym. 250; s. c., 5 Mod. 575; and 12 Mod. 145; but we submit that the dictum of Lord Holt in that case cannot be sustained, and that it has not been followed in Rigg *v.* Lonsdale, 1 H. & Norm. 923;† which latter case, although considered by the Court below as governing the present case, ought not to be received as an authority by your Lordships upon the question before you, because the only material question in that case was, the ownership of the soil under the first count of the declaration, and the decision was merely upon the question of the costs of a count in trover, was not argued in the Exchequer Chamber, and is contrary to the current of authority. [They also cited The Duke of Devonshire *v.* Lodge, 7 B. & Cr. 36 (E. C. L. R. vol. 14).]

Macaulay, Q. C., and *Field*, Q. C., for the respondents, contended, that the rabbits in question were the property of the Marquis of Exeter, who was the owner of the soil on which they had been killed. It may be true that by the civil law there is no property in animals feræ naturæ, but in this respect there is a difference between the civil law and the common law of England, which has always recognised a qualified, if not an absolute, property in them. There is, moreover, a distinction between those animals feræ naturæ which are fit for the food of man, *i. e.*, game, and those which are merely vermin. As to the former, there is always a property in some one in them, whether alive or dead: Just. Inst., Sandars 172; Sutton *v.* Moody, ubi sup.; Gundry *v.* Feltham, 1 T. R. 334. The act of the trespasser enures for the

benefit of the owner of the soil. It is a wrongful act, and a wrong-doer can acquire no title by his wrong. No man can by wrongful labour acquire a title to that which is either the exclusive property of the owner of the soil, or which he has the sole right to take: Harewood's Forest Law 198, 4th ed. of 1717; Year Book, 12 Hen. 8, fol. 9; Churchward *v.* Studdy, ubi sup. It does not necessarily follow from this proposition that game killed by a poacher becomes the property of the owner of the soil; that, therefore, the poacher is guilty of larceny, for game, like fruit, is attached to the freehold, of which there can be no larceny. The 25 & 26 Vict. c. 114, directed game found on a poacher to be sold, on his conviction, for the benefit of the county or borough, because the conviction was for the benefit of the landowners, and it might not be always possible to ascertain the owner of the soil on which the game was killed. Lord Holt's propositions in Sutton *v.* Moody, ubi sup., one hundred and fifty years ago, are quoted in every work on the subject, and have been not only followed in Rigg *v.* Lonsdale, but also in Churchward *v.* Studdy, ubi sup., and Graham *v.* Ewart, 11 Exch. 346.†

Hayes, Serjt., in reply, referred to 2 Russ. Crimes, *Larceny*, 136, 2d ed., and the 7 & 8 Geo. 4, c. 29, s. 36.

The following authorities, in addition to those mentioned above, were cited in the course of the arguments: Stats. 11 Hen. 7, c. 17, and 14 Hen. 7, fol. 1; Polixfen *v.* Crispin, 1 Vent. 122; Child *v.* Greenhill, Cro. Car. 553; Haddesden *v.* Gryssel, Cro. Jac. 195; The Coney's Case, Godb. 122; Keeble *v.* Hickersgill, 11 Mad. 131; and the 10 & 11 Will. 4, c. 32.

Judgment was reserved.

LORD CHANCELLOR.—My Lords, when it is said by writers on the common law of England that there is a qualified or special right of property in game—that is, in animals, feræ naturæ, which are fit for the food of man—whilst they continue in their wild state, I apprehend that the word "property" can mean no more than the exclusive right to catch, kill, and appropriate such animals, which is sometimes called by the law a reduction of them into possession. This right is said in law to exist ratione soli or ratione privilegii, for I omit the two other heads of property in game which are stated by Lord Coke, namely, propter industriam and ratione impotentiæ, for these grounds apply to animals which are not in the proper sense feræ naturæ.

Property ratione soli is the common-law right which every owner of land has to kill and take all such animals feræ naturæ as may from time to time be found on his land, and as soon as the right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil. Property ratione privilegii is the right which, by a peculiar franchise anciently granted by the Crown by virtue of its prerogative, one man may have the right of killing and taking animals feræ naturæ on the land of another; and in like manner the game, when killed or taken by virtue of the privilege, becomes the absolute property of the owner of the franchise, just as in the other case, it becomes the absolute property of the owner of the soil.

The question in the present case is, whether game found, killed, and taken upon my land by a trespasser becomes my property as

much as if it had been killed and taken by myself, or by my servant with my authority. Upon principle, there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is, of a wrongdoer, should divest the owner of the soil of his qualified property in the game, and give the wrongdoer an absolute property to the exclusion of the rightful owner. But in game, when killed and taken, there is absolute property in some one, and therefore the property in game found and taken by a trespasser on the land of A. must rest either in A. or the trespasser; and if it be unreasonable to hold that the property vests in the wrongdoer, it must of necessity be vested in A., the owner of the soil. This view of the case is supported by a series of decisions. In the case of Sutton *v.* Moody, 1 Ld. Raym. 250, Holt, C. J., deduced several conclusions from the Year Books on the subject of property in game. Amongst these are the following propositions:—"If A. starts a hare in the ground of B., and hunts it, and kills it there, the property continues all the while in B." In the case thus put, it must of course, be taken that A. has hunted and killed the hare without the leave or license of B., and therefore that it is a wrongful act by A., which enures to the benefit of the true owner, viz., the owner of the soil. Another proposition is, that "if A. start a hare in the forest or warren of B., and hunts it into the ground of C., and there kills it, the property remains all the while in B., the proprietor of the warren, because the privilege continues;" and consequently B. is entitled to the absolute property in the dead game so chased and killed by A., who, from the statement of the case, must be taken to have entered without the license of B., and therefore to have been a trespasser. A third proposition is, that "if A. starts a hare in the ground of B. (who is entitled ratione soli only, for that is plainly implied), and hunts it into the ground of C., and there kills it, the property is in A., the hunter," for it cannot be in B., who is entitled ratione soli only, and not ratione privilegii, for the hare is not killed upon his land; and it cannot be in C., for the game was not originally found in his possession, but was driven upon his ground by the chase and pursuit of the hunter. These propositions appear to me to prove clearly that game found and killed by a trespasser under such circumstances as that it would be the absolute property of the owner of the soil, or of the owner of the right of free warren, if it had been found and killed by such owner, instead of by the trespasser, does in law become the absolute property of the proprietor of the soil or privilege immediately on its being so caught and killed by the trespasser. The law so laid down in Sutton *v.* Moody is consistent with several earlier cases decided subsequently to the Year Books, of which I will mention one, The Coney's Case, Godb. 122, which has been recognised and acted upon in several subsequent decisions. Of these I may mention Churchward *v.* Studdy, 14 East 249; Graham *v.* Ewart, 11 Exch. 346;† and lastly, The Earl of Lonsdale *v.* Rigg, 1 H. & Norm. 923;† 11 Exch. 671,† on which so much reliance was placed by the Courts of Queen's Bench and Exchequer Chamber in the decision of the present case. With respect to the case of Lonsdale *v.* Rigg, I entirely concur in the observations of

Blackburn, J., and consider the case as a conclusive authority upon the point before us, which it is not desirable to question or disturb. That case, when considered, amounts to this—that grouse were shot and taken away by a trespasser upon and from the land of the plaintiff, who brought trover for the dead grouse; and it was clearly held by the Judges of the Exchequer, and afterwards by all the Judges of the Court of Error, that the grouse, as soon as they were killed, and fell upon the land of the plaintiff, became and were his absolute property in respect of his ownership of soil. This conclusion would not be affected, even though it be true that an indictment at common law will not lie against the trespasser for killing and carrying away game, if it be one continuous act, inasmuch as the ownership of the game is considered as incident to the property in the land. But this consequence is the result of a peculiarity in the law of larceny, which holds that the act of severing and taking away things attached to the freehold is not a felonious taking—a result which does not affect the existence of the rights of property.

I am, therefore, of opinion that the learned counsel for the defendants on the trial at Nisi Prius were right in requiring the evidence to be admitted which they proposed to give in order to prove that the property in the rabbits was in Lord Exeter, and that the learned Judge was wrong in his direction to the jury that such evidence was immaterial, and ought not, therefore, to be admitted. I am, therefore, of opinion that the order making the rule nisi for a new trial absolute was right, and that the present appeal ought to be dismissed, with costs,

Lord CRANWORTH.—I think it is safe and just to adhere to the law as laid down by Lord Holt. He had evidently considered the subject carefully, and, according to his view of the law, the rabbits killed by a trespasser on the lands of Lord Exeter certainly belonged to his lordship. Lord Holt's opinion was followed in Churchward *v.* Studdy, ubi sup. There, the hunter (who was a poacher) was eventually held to be entitled to the hare, but that was because he started it on the land of a third person, and followed it on to the ground of the defendant, and there caught and killed it. It was in strict conformity with Lord Holt's view of the law, to hold that, under these circumstances, the hare belonged to the poacher. The rule nisi was granted by the Court of King's Bench, on the supposition that the hare had been caught on the land of the defendant by his servant, acting as his agent; in which case the Court clearly thought it would have been the property of the defendant, whereas, in fact, the defendant's servant was assisting the hunter and his dogs. This case was followed by that of Lord Lonsdale *v.* Rigg, afterwards affirmed in the Exchequer Chamber, where the subject was carefully considered. It was there decided, that grouse killed by a poacher belong to the owner of the soil on which they are killed; strictly following Lord Holt's doctrine. There was not a formal plea in that case traversing the property in the birds, but it was agreed to waive that objection in point of form, and to dispose of the case as if such an issue had been expressly raised.

It was argued before this House, that if game killed by a poacher is the property of the owner of the soil, then every poacher is guilty of larceny. But that is a fallacy. Wild animals whilst living, though

they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels, so as to be the subject of larceny. They partake while living of the quality of the soil, and are, like growing fruit, considered as part of the realty. If a man enters my orchard and fills a wheelbarrow with apples which he gathers from my trees, he is not guilty of larceny, although he has certainly possessed himself of my property; and the same principle is applicable to wild animals.

It was further said that the late Game Act, which authorizes the stopping of a poacher having game in his possession, and the selling of the game for the benefit of the parish, shows that the legislature could not have understood the game to be the property of the person on whose land it was killed; for in that case it was said it would have been an unjust appropriation of the property of another. But this arrangement was probably made because it might often be impossible to know on whose land every particular head of game had been killed, and was considered to be, on the whole, an arrangement beneficial to the landowner. On the whole, I see no reason for disturbing the decision of the Court below, and I think that there ought to be a new trial.

Lord CHELMSFORD.—My Lords, the question to be determined on this appeal is, whether animals feræ naturæ, killed or reduced into possession by a trespasser on the land of another, become the property of the owner of the land. The case was very learnedly argued on both sides, and all the authorities with respect to property in wild animals, either in a state of nature or reclaimed, were fully examined, and both the civil and the common law were referred to for doctrine on the subject.

By the civil law, the person who took or reduced into possession any animal feræ naturæ, although he might be a trespasser, in so doing acquired the property in it. This appears clearly from the passage of the Institutes, cited in the argument: Just. Inst. lib. 2, tit. 1, cl. 12. If the same rule prevails in our land, then the rabbits in question were not the property of Lord Exeter, but of the poacher, who took and killed them upon his land. This doctrine, however, as to the right of property in wild animals captured, seems never to have prevailed in our land to its full extent. With respect to animals in a wild and unreclaimed state, there seems to be no difference between the Roman and the common law. A distinction was suggested in argument between wild animals, which are unprofitable and regarded as vermin, and those which are fit for food, and therefore profitable; and it was said of the latter, that, by the law of England there is always a property in game, whether alive or dead, in somebody. But this is not reconcilable with the authorities. In the Case of Swans, 7 Rep. 15 b, 17 b, Lord Coke says: "A man hath not absolute property in anything which is feræ naturæ, but in those which are domitas naturæ—properly qualified and possessory, a man may have in those which are feræ naturæ; and to such property a man may attain in two ways—by industry, or ratione impotentiæ et loci. . . . But when a man hath savage beasts, ratione privilegii, as by reason of a park, warren, &c., he hath not any property in the deer, conies, or pheasants, or partridges, and, therefore, in an action quare

parcum warrenium, &c., fregit et intravit, et tres damas lepores cuniculos phasianos perdices cepit et asportavit, he shall not say suos, for he hath no property in them, but they do belong to him ratione privilegii, for his game and pleasure so long as they remain in the privileged place;" à fortiori, therefore, where a person is merely the owner of land, without any other privilege attached to it than that which the ownership confers, he can have no property in the wild animals upon the land so long as they are in a state of nature, and unreclaimed. Indeed, this notion of the existence of property in wild animals is inconsistent with the whole current of the authorities from the Year Books downwards, which almost invariably show that no action lies merely for taking away hares, conies, pheasants, and partridges, and that where the taking animals of this description is stated in the writ, in addition to the trespass upon the land, the plaintiff shall not say "lepores, &c., suos." With respect to wild and unreclaimed animals, therefore, there can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain, that when killed or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property absolutely when they are killed, and in a qualified manner when they are reclaimed.

So far everything is clear, and the only difficulty which arises upon the subject of property in wild animals is that which the present case presents. As animals feræ naturæ, when killed or reduced into possession by the owner of the land where they are found, or by his authority, become instantly his property, does the unauthorized act of a trespasser, by the very act of killing them, convert them at once to the use of the owner of the land? To this question, Lord Holt, according to the case which he puts, of Sutton *v.* Moody, would have given a distinct answer, that provided the game was both started and killed on the ground of the same owner, the property would be in him. I think Lord Holt must have been of opinion, that as long as the game continued upon the land there was a species of property, or rather, perhaps, a right to take it, existing in the owner of the land, which was sufficient to make it his the instant, by being killed or taken, it became the subject of property. But I cannot so easily discover the principle upon which he proceeded when he said, that "if A. starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A., the hunter; but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C." I have some difficulty in understanding why the wrongdoer is to acquire property in the game under the circumstances here supposed. If the animal had left the land of B., and passed into the land of C. of its own will, and had been, immediately it crossed the boundary, killed by C., it would unquestionably have been his property. Why, then, should not the act of a trespasser, to which C. was no party, have the same effect, as to his right to the animal, as if it had voluntarily quitted the neighbouring land? And why not only should B. lose his right to the game, and C. acquire none, but the property, by this accident of the place where it happened to be killed, be transferred to the trespasser? It would appear to me to be more in accordance with principle to hold, that if the trespasser deprived the owner

of the land where the game was started of his right to claim the property, by unlawfully killing it on the land of another, to which he had driven it, he converted it into a subject of property for that owner, and not for himself. But the first proposition stated by Lord Holt, with respect to game started and killed on the land of the same owner, is free from all difficulty, and is sufficient to dispose of the present question. The case of Sutton *v.* Moody has always been regarded as an authority upon this point, and, as far as I can ascertain, has never been questioned. It was recognised in Churchward *v.* Studdy, ubi sup.; in Graham *v.* Ewart, ubi sup.; by Baron Martin in Rigg *v.* Lord Lonsdale, ubi sup.; and in this last case when before the Court of error, 1 H. & Norm. 923,† Coleridge, J., said: "The grouse shot on the land of the plaintiff (*i. e.* shot by the defendant, a wrongdoer) belonged to him according to all the authorities. It certainly would not be right to disturb a principle of law so long established, unless it could be clearly shown to be erroneous. And it appears to me not only to be well founded, but that very strange consequences would follow from adopting the view contended for by the appellant. If he is right in saying that the owner of the land has no property in game unless it is killed by him or by his authority, it will necessarily follow that a poacher reducing the game into possession, and thereby, as possessor, though a wrongdoer, having a right to it against all the world but the true owner, there being no owner to challenge his possession, might maintain an action against the owner of the land for taking the grouse from him, even upon the land itself where it was killed. It is much more reasonable to hold, that the trespasser having no right at all to kill the game, can give himself no property in it by his wrongful act; and that, as game killed or reduced into possession is the subject of property and must belong to somebody, there can be no other owner of it, under these circumstances, but the person on whose ground it is taken or killed." This view of the case will render the distinction suggested in the course of the argument, between killing and carrying away the rabbits, as parts of one and the same continuous act, and killing them and leaving them upon the land and coming back for them, wholly immaterial. For the act of killing being at once that which made the rabbits the subject of property and reduced them into possession, whether they were for an instant or for hours upon the land, they equally belonged to the owner of the land. For these reasons, I think that the judgment of the Court of Exchequer Chamber, affirming the judgment of the Court of Common Pleas, was right, and ought to be affirmed.

Judgment affirmed, and appeal dismissed, with costs.(a)

(a) Notes for reference: Sutton *v.* Moody, 1 Ld. Raym. 250; Churchward *v.* Studdy, 14 East 249; and Rigg *v.* Lonsdale, 1 H. & Norm. 923;† 11 Exch. 671;† s. c., 9 Jur. N. S. 1040.

IN THE HOUSE OF LORDS.

[Before the LORD CHANCELLOR (Lord WESTBURY), Lord CRANWORTH, Lord CHELMSFORD, and other Lords.]

TAPLING v. JONES.—*Feb.* 17, 20, *and* 21, *and March* 16.(a)

The right to an ancient light now depends upon the 2 & 3 Will. 4, c. 71 (the Act shortening the time of prescription), and not upon any presumption of grant or fiction of license; and being an absolute, indefeasible, and unqualified statutory right, cannot be lost by a subsequen intermission of enjoyment, not amounting to intentional abandonment, nor can it be prejudice by an attempt to extend the access of light beyond that access which has so become indefeasible.

The "right to obstruct light" possessed by the owner of a servient tenement is simply his right of building on his own land, and the opening of new windows by the owner of the dominant tenement neither confers nor enlarges such right.

The "invasion of privacy by opening windows" is not a legal wrong or injury, the opening of new windows being in law an innocent act.

Accordingly, where the owner of a dominant tenement, whilst preserving one ancient window, altered old windows, and opened new windows upon the same side of his house, so that the owner of the servient tenement was obliged, in obstructing the new and altered lights, also to obstruct the ancient lights—Held, that such obstruction was illegal.

Renshaw v. Bean, 18 Q. B. 112; 16 Jur. 814, and Hutchinson v. Copestake, 8 C. B. N. S. 102; 8 Jur., N. S., 54, overruled.

THIS was an appeal by writ of error from a judgment of the Court of Exchequer Chamber (reported 9 Jur. N. S. 462), affirming a judgment of the Court of Common Pleas (reported 8 Jur. N. S. 333), in an action for the obstruction of ancient lights.

In June, 1857, the respondent, Mr. Hugh Jones, a wholesale dealer in silk, carried on business in his warehouses, 108 and 109, Wood Street, Cheapside. In July of that year he purchased No. 107, a three-storied house, with one window in each story, which was in a line with and adjoined his warehouses, and had been up to that time occupied as a public-house, known as The Magpie and Pewter Platter. The windows in No. 107 were ancient lights; and the houses Nos. 107, 108, and 109 abutted, on their rear or west side, upon certain premises fronting in Gresham Street West, the property of the appellant, Mr. Thomas Tapling, a carpet watehouseman, upon which he, at the time of the respondent's purchase of No. 107, was about to erect new warehouses.

Immediately after the purchase the respondent altered No. 107 to correspond with his warehouses at Nos. 108 and 109, by lowering the first and second floors, and lowering two of the windows in such floors to suit their new position. The third window, however, was retained in its original position. One of the lowered windows was about one foot longer than before, and the other about the same size as the old one, both of them occupying parts of the old apertures. The respondent also built two additional stories to No. 107, opening a new window in the fourth story, and in the fifth story placing a window which extended across the entire width of the building. The alterations were completed in August, 1857; and the new windows and lights were so situated that it was impossible for the owner of the Gresham Street property to obstruct or block them without also obstructing both the altered windows and the ancient window. After these alterations and additions were completed, the appellant pro-

(a) 11 Jur. N. S. 309, 34 L. J. C. P. 342.

ceeded to erect his intended warehouse on his Gresham Street property, and built up a wall to such a height as to obstruct the whole of the windows and lights of No. 107. Part of this wall was the eastern side of the appellant's warehouse, and the residue was a blank wall of the same height in continuation of the warehouse wall. It was admitted that the obstruction could not have been made in a more convenient manner than by building up a wall of sufficient height on the appellant's premises. During September and October a correspondence took place between the solicitors of the respondent and appellant, the former denying and the latter asserting, the right of the appellant to build the obstruction in question. The appellant's wall was completed at the end of October, 1857. Previously to the 4th February, 1858, the respondent, under the advice of counsel, blocked up the new windows, and restored the altered windows to their original size and position, and called upon the appellant to remove his obstruction; this Mr. Tapling refused to do, and Mr. Jones commenced on the 24th February an action in the Court of Common Pleas against Mr. Tapling for obstructing, and keeping obstructed, the ancient lights. The cause came on to be tried before Lord Chief Justice Cockburn on the 16th February, 1859, when, by consent, it was ordered that a verdict should be entered for the respondent for the damages claimed, subject to a special case to be stated. The special case was argued before Lord Chief Justice Erle and Justices Williams, Byles, and Keating. On the 31st January, 1862, the Court delivered judgment (8 Jur. N. S. 333), the questions for consideration being—first, was the appellant, the owner of the servient tenement, justified in erecting the obstruction complained of; and, secondly, was he justified in continuing it after the respondent, the owner of the dominant tenement, had closed up the new windows and restored those altered to their original size and position. Upon the first question the Court unanimously held in favour of the appellant; upon the second question their Lordships differed, the Lord Chief Justice Erle and Justice Williams being in favour of the respondent, and Justices Byles and Keating in favour of the appellant. Mr. Justice Keating, being the junior Judge, withdrew his judgment, in order that the case might be carried up to the Court of error, and judgment was formally entered up for the respondent.

The Court of Exchequer Chamber delivered judgment on the 12th July, 1863 (9 Jur. N. S. 462), when their Lordships also differed in opinion; Justice Crompton and Justice Wightman considering that the original obstruction was lawful, but that continuing the obstruction after the occasion for it had ceased was unlawful; Baron Bramwell and Justice Blackburn thinking that the original obstruction was unlawful; and Chief Baron Pollock and Baron Martin holding that the original obstruction being lawful when erected, could not become unlawful at the option and by the act of the aggressor. The judgment of the Court below was consequently affirmed.

Mr. Tapling now appealed by writ of error, on the grounds, that the respondent having showed an intention to assert a permanent right to the new windows and lights, the appellant was justified in opposing the encroachment by an obstruction of a permanent nature; that by the alteration of the old windows and lights in No. 107 and

the opening of additional ones, the respondent had forfeited his original right to the access of light and air as supplied by the old windows, and did not, by the restoration of the windows to their original state, regain his original right, or acquire a right to insist upon the removal of the appellant's obstruction, and that the appellant under the circumstances had a right to enjoy his Gresham Street property free from any easement whatever.

Sir *R. Palmer*, A. G., and *Archibald*, for the appellant, contended that the alteration of the windows below, and the addition of the windows above, the ancient light, so changed the character of the previously-acquired right to light and air, as entirely to destroy it; and as to the alteration of the lower windows, they argued that the owner of ancient windows is bound to keep himself within their original dimensions, and that if he changes or enlarges them in any way, although retaining the old openings in whole or in part, he must be taken either to have relinquished his right or to have lost it. [They referred to the authorities cited in the Courts below, and also to Dougall *v.* Wilson, 2 Wms. Saund. 175 a; Davies *v.* Marshall, 7 Jur. N. S. 720; Weatherley *v.* Ross, 1 Hem. & Mil. 349; Martin *v.* Headon, 10 Jur. N. S. 5; and Gale on Easements 284, 477, 483, 484, 499, 500.]

Sir *Hugh Cairns*, Q. C., and *Cleasby*, Q. C., for the respondent, were not called upon.

March 16.—LORD CHANCELLOR.—By the 3d section of stat. 2 & 3 Will. 4, c. 71, intituled "An Act for shortening the time of prescription in certain cases," it is enacted, "that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Upon this section, it is material to observe, with reference to the present appeal, that the right to what is called an ancient light now depends upon positive enactment. It is matter juris positivi, and does not require, and therefore ought not to be rested on any presumption of grant, or fiction of a license having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title, which would otherwise arise from uninterrupted user or possession during the requisite period. This observation is material, because I think it will be found, that error in some decided cases has arisen from the fact of the Courts treating the right as originating in a presumed grant or license.

It must also be observed, that after an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible; and it would seem, therefore, that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandonment. Moreover, this absolute and indefeasible right, which is the creation of the statute, is not subjected to any condition or qualification; nor is it made liable to be affected or prejudiced by any attempt to extend the

access or use of light beyond that, which, having been enjoyed uninterruptedly during the required period, is declared to be not liable to be defeated.

Before dealing with the present appeal, it may be useful to point out some expressions which are found in the decided cases, and which seem to have a tendency to mislead. One of these expressions is the phrase "right to obstruct." If my adjoining neighbour builds upon his land, and opens numerous windows, which look over my gardens or my pleasure-grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. I have simply the same right of building or raising any erection I please on my own land, unless that right has been by some antecedent matter either lost or impaired, and I gain no new or enlarged right by the act of my neighbour.

Again: there is another form of words which is often found in the cases on this subject, namely, the phrase "invasion of privacy by opening windows." That is not treated by the law as a wrong, for which any remedy is given. If A. be the owner of beautiful gardens and pleasure-grounds, and B. is the owner of an adjoining piece of land, B. may build upon it a manufactory with 100 windows, overlooking the pleasure-grounds, and A. has neither more nor less than the right which he previously possessed of erecting on his land a building of such height and extent as will shut out the windows of the newly-erected manufactory.

If, in lieu of the words "the access and use of light to and for any dwelling-house," in the 3d section of the statute, there be read, as there well may, "Any window of any dwelling-house," the enactment (omitting immaterial words) will run thus, "When any window of a dwelling-house shall have been actually enjoyed therewith for the full period of twenty years, without interruption, the right to such window shall be deemed absolute and indefeasible."

Suppose, then, that the owner of a dwelling-house with such a window, that is, with an absolute and indefeasible right to a certain access of light, opens two other windows, one on each side of the old window, does the indefeasible right become thereby defeasible? By opening the new windows he does no injury or wrong in the eye of the law to his neighbour, who is at liberty to build up against them, so far as he possesses the right of building on his land; but it must be remembered, that he possesses no right of building so as to obstruct the ancient window; for to that extent his right of building is gone by the indefeasible right which the statute has conferred.

Believing this to be the sound principle, I cannot accept the reasoning on which the decisions in Renshaw *v.* Bean, 18 Q. B. 112 (E. C. L. R. vol. 83), and Hutchinson *v.* Copestake, 8 C. B. N. S. 102 (E. C. L. R. vol. 98), were founded. The facts of those two cases were not exactly the same as in the present; for in neither was any ancient window preserved unaltered; but the old windows had been enlarged and new ones added; in which state of things it was held, that, inasmuch as it was not possible for the adjoining proprietor to obstruct the new windows and the excess of the ancient lights, without at the same time obstructing the original apertures, the owner of the house must be considered as having lost his right to the ancient lights, at all

events, until he restored his house to its original condition. According to these cases, the law must be thus stated, namely, if the owner of a dwelling-house with ancient lights opens new windows in such a position as that the new windows cannot be conveniently obstructed by an adjoining proprietor without obstructing the old, he, the adjoining proprietor, is entitled so to do; at all events, so long as the new windows remain. Upon examining the judgments, it will be seen that the opening of the new windows is treated as a wrongful act done by the owner of the ancient lights, which occasions the loss of the old right he possessed; and the Court asks whether he can complain of the natural consequence of his own act?

I think two erroneous assumptions are involved in, or underlie, this reasoning. First, that the act of opening the new windows was a wrongful one; and, secondly, that such wrongful act is sufficient in law to deprive the party of his right under the statute. But, as I have already observed, the opening of the new windows is in law an innocent act; and no innocent act can destroy the existing right of the one party, or give any enlarged right to the other, namely, the adjoining proprietor.

In the present case, an ancient window in the plaintiff's house has been preserved, and remained unaltered during all the alterations of the building, and the access of light to that window is now obstructed by the appellant's wall. A majority of the Court below have held, that the obstruction was justified whilst the new windows which the plaintiff sometime since opened remained, but was not justifiable when those new windows were closed, and the house, so far as regards the access of light, was restored to its original state. But on the plain and simple principles I have stated, my opinion is, that the appellant's wall, so far as it obstructed the access of light to the respondent's ancient unaltered window, was an illegal obstruction from the beginning; and I have great difficulty in acceding to the reasoning, that this permanent building of the appellant was a legal act when begun, and completed, but has subsequently become illegal through a change of purpose on the part of the respondent. On such a principle, the person who opens new lights might allow them to remain until his neighbour, acting legally according to these judgments, has, at great expense, erected a dwelling-house, and then, by abandoning and closing the new lights, might require his neighbour's house to be pulled down. I think the judgment ought to be affirmed, but not on the ground or for the reasons given by the majority of the Judges in the Courts below. I therefore move your Lordships that the judgment of the Court below be affirmed.

Lord CRANWORTH.—My Lords, the question raised by the special case is, whether the plaintiff in error was justified in erecting, opposite and near to the house of the defendant in error, a building, which prevented the access of light and air through several ancient windows, through which light and air had been accustomed to pass to the house in question without interruption.

Previously to the erection by the plaintiff in error of the buildings complained of, the defendant in error made extensive alterations in his house, and in so doing opened new and enlarged several of the old windows; and it was not disputed that the plaintiff in error was justi-

fied in obstructing the new and the enlargements of the old windows. He effected his obstruction by erecting a permanent building on his own land so near to the house of the defendant in error as to obstruct the whole of the lights, the old as well as the new. The special case finds as a fact, that it was impossible for him to obstruct or block the new windows without at the same time obstructing or blocking that portion of the windows and lights which occupied the site of the ancient windows. And his counsel argued, on the authority of Renshaw *v.* Bean, 18 Q. B. 112 (E. C. L. R. vol. 83), that in these circumstances he had a right to erect the building in question.

After it had been so erected, the defendant in error caused the altered windows to be restored to their original state; and he also filled up with brickwork the spaces occupied by the new windows; and having done this, he called on the plaintiff in error to remove the building which then blocked up the ancient, and only the ancient, windows. This application was not complied with, and thereupon the defendant in error brought his action in the Court of Common Pleas against the plaintiff in error for obstructing his ancient lights.

At the trial, a verdict was found for the plaintiff in error, subject to a special case, which was afterwards argued before the Court of Common Pleas; and the Court being equally divided in opinion, the junior Judge following the usual practice, withdrew his opinion, and judgment was then given for the now defendant in error according to the opinions of what was then the majority of the Court. The case was then brought to the Court of error, where the judgment below was affirmed, four of the six learned Judges, who heard the case, concurring in opinion with the Court of Common Pleas in favour of the defendant in error, and two dissenting. The case was then brought by writ of error to this House, and the plaintiff in error was heard at the bar. We did not call on the defendant in error to support his case, being of opinion that the plaintiff in error had laid no ground for disturbing the judgment below; though our opinion was not founded on the same ground on which the majority of the Judges below seem to have proceeded.

The case raised two questions—first, whether the plaintiff in error was justified in erecting the building whereby the access of light and air to the house of the defendant in error was obstructed? and, secondly, if he was, then whether he was bound to remove it after the windows of the defendant's house had been restored to their ancient condition?

Having arrived at the conclusion that the plaintiff in error had no right to erect the building complained of, the second question does not arise; and I will, therefore, proceed to state shortly the grounds on which my opinion rests.

The right to enjoy light through a window looking on a neighbour's land, on whatever foundation it might have rested previously to the passing of the 2 & 3 Will. 4, c. 71, depends now on the provisions of that statute. The 3d section enacts, that when the access and use of light for any dwelling-house or other building shall have been actually enjoyed therewith for twenty years without interruption, the right therein shall be deemed absolute and indefeasible.

The special case finds, that the windows of the house of the defend-

ant in error previously to the alterations made by him in 1857 were ancient windows, by which we must understand windows through which he had enjoyed access of light without interruption for twenty years. His right, therefore, to that light was, by the express provision of the statute, absolute and indefeasible. It is not disputed, that when the plaintiff in error erected his wall, he obstructed the light to which the defendant in error was so entitled, and that so he prevented him from enjoying what the statute declares was his absolute and indefeasible right.

The plaintiff in error, in justification of the course he took, raised his wall, and so caused the obstruction complained of; the defendant in error had made material alterations in his house, enlarging the old windows, and adding new ones. There was nothing to make it unlawful for the plaintiff in error to obstruct the access of light to these new windows, and to so much of the altered old windows as did not occupy the old site through which light had formerly passed; and as it was impossible to do this without at the same time obstructing the light which had previously passed through the old windows (so, at least, we must take the fact to be), the plaintiff in error contends that he had a right to obstruct the whole.

I am unable to comprehend the principle on which such a claim can rest; where a person has wrongfully obstructed another in the enjoyment of an easement, as, for instance, by building a wall across a path over which there is a right of way, public or private, any person so unlawfully obstructed may remove the obstruction; and if any damage thereby arises to him who wrongfully set it up, he has no right to complain. His own wrongful act justified what would otherwise have been a trespass. But this depends entirely on the circumstance, that the act of erecting the wall was a wrongful act; whereas the opening of a window is not an unlawful act; every man may open any number of windows looking over his neighbour's land; and, on the other hand, the neighbour may, by building on his own land within twenty years after the opening of the window, obstruct the light which would otherwise reach it. Some confusion seems to have arisen from speaking of the right of the neighbour in such a case as a right to obstruct the new lights. His right is a right to use his own land by building on it as he thinks most to his interest; and if, by so doing, he obstructs the access of light to the new windows, he is doing that which affords no ground of complaint. He has a right to build, and if thereby he obstructs the new lights, he is not committing a wrong. But what ground is there for contending, that because his building so as to obstruct a new light would afford no ground of complaint, therefore, if he cannot so build without committing a trespass, he may commit a trespass? I can discover no principle to warrant any such inference.

I will put this case:—Suppose the owner in fee simple of close A. were to build a house at the edge of close A. with windows overlooking close B., held by himself as tenant for life, or by a tenant for life, who, from feelings of kindness, would not object to the opening of the windows of the new house, at the end of twenty years he would, according to the 3d and 7th sections of the Act, have acquired an absolute and indefeasible right to the access of light across close B.

It surely cannot be contended that the remainderman, because he could not otherwise prevent the owner of the house from acquiring this right, might, before the expiration of twenty years, come on the land of the tenant for life, and there erect a building to obstruct the light of the new windows; and yet the argument of the plaintiff in error must go this length, for there is no difference in principle between a trespass on the soil and any other trespass.

In the case now under discussion, the new windows were opened by the same person who had a right to access of light through the old windows; but this might have been otherwise. Suppose the owner of an ancient window on a first floor not to be the owner of the second floor, and that the owner of that floor should open a window which the owner of the adjoining land could not obstruct, without at the same time obstructing the ancient light, no one, I suppose, would argue, that in such a case the owner of the land over-looked could obstruct the ancient light; and yet I can see no difference in principle between the two cases. It may be said, that, in the case I have just put, the owner of the ancient light was in no default, and could not be affected by the act of a stranger. But neither is he in any default when he opens a new window himself. He does what he lawfully may do; and if the act done is lawful, I do not understand how the consequence can be different when it is the act of the party himself and when it is the act of a stranger. If, after the owner of the second floor had opened a new window, and within twenty years, the owner of the first floor had purchased the second floor, would the continuance by him of the new window authorize the neighbour in obstructing the old light, if he could not otherwise obstruct the new one? This will hardly be contended. So, again, suppose the owner of the first floor to have demised the second floor to a tenant, and that he, without the license of his landlord, put out the new window; this might entitle the landlord to complain of his tenant as having been guilty of waste, but it can hardly be contended that it would justify the neighbour in obstructing the ancient light enjoyed by the landlord. So, again, if the landlord had given his permission to the tenant to open the window, I cannot see any difference which this would make; the tenant would, quoad hoc, be unimpeachable of waste; but it would be lawful to the landlord to make such a demise, which could not in any respect affect the relative rights of the landlord and his neighbour.

Suppose the owner of a house has a right of way to the door of his house over his neighbour's land—a case put by Mr. Justice Blackburn in his judgment—the argument of the plaintiff in error would go to show, that if the owner of the house should put a pane of glass in his door, his right of way would or might be at an end; for it would be lawful for the neighbour to obstruct it, if he could not otherwise obstruct the light.

I will not, however, multiply illustrations. The plain principle seems to me to be, that no one can interfere with the absolute and indefeasible right of another, unless where such interference is made necessary by the wrongful act of the party possessing the right.

I do not attempt to disguise from myself, that unless the facts of this case can be distinguished from those in Renshaw *v.* Bean, the conclusion at which I have arrived is directly at variance with the

decision of the Court of Queen's Bench in that case. But, I own, I think that the facts there were substantially the same as those now before us, and the Court decided there that the obstruction of the ancient light was in such a case justifiable. Lord Campbell, in delivering the judgment of the Court in that case, stated that the Court did not proceed on the ground that the plaintiff, whose ancient lights were obstructed, had lost the right which he had previously enjoyed, of having light and air through such portions of the new windows as had formed portions of the ancient windows; but his Lordship added, "If by the alterations which the plaintiff made he exceeded the limits of that right, and so put himself into such a position that the excess could not be obstructed by the defendant without at the same time obstructing the former right of the plaintiff, he has only himself to blame." The observations I have already made sufficiently indicate the reasons on which I cannot assent to this reasoning; and unless that reasoning be sound, the judgment cannot be supported.

The case of Renshaw *v.* Bean was followed in that of Hutchinson *v.* Copestake not only in the Court of Common Pleas, where the decision of the Court of Queen's Bench was considered to be binding, but also in the Exchequer Chamber, though there some of the Judges seem to have proceeded on the special facts of that case. It is, however, the duty of this House, as the ultimate Court of appeal, to lay down the law on what they consider to be the correct principles, and though we should be slow to decide contrary to the decisions of the Courts of Westminster Hall, where they have been long recorded and acted on, even if we see cause to question the grounds on which they were supposed to rest, yet no such principle ought to restrain us from correcting what we consider to have been an erroneous decision, pronounced only thirteen years ago; more especially when we have, as in this case, the opinions of two very learned Judges, expressing their very decided dissent from it, and when we think we can discover in the judgments of the Chief Justice of the Common Pleas, and of Mr. Justice Williams, great doubts, to put it no higher, of the soundness of the decision which we are overruling.

My clear opinion is, that the judgment below ought to be affirmed.

Lord CHELMSFORD.—My Lords, I agree with the judgment of the Court of Exchequer Chamber, but on different grounds from those on which it proceeded.

The only facts of the special case which are necessary to be noticed are, that in making the alterations in his house, which originally consisted of three stories, with one window in each story, the respondent altered the windows in the two lower stories, but so as to make them both occupy part of the old apertures, and retained the window in the third story unaltered, and built two additional stories, in each of which he put a new window. That after these alterations were completed, the appellant, who had previously made preparations for erecting a warehouse on the site of some old buildings which he had pulled down, built up a wall to such a height as to obscure the whole of the lights in the respondent's buildings, it being impossible (as the special case states) for the appellant to obstruct or block up the upper windows without obstructing or blocking up the portion of the windows or lights which occupied the site of the ancient windows. The special case also

states that the new upper windows could not have been obstructed in a more convenient manner (by which I understand more convenient for the appellant), than by building up a wall of sufficient height on his premises. After the appellant's wall was finished, the respondent caused the altered windows in his building to be restored to their original state, and the new windows in the upper stories to be blocked up, and then called upon the appellant to pull down his wall and restore to the respondent's premises their former light and air. The appellant refused, and thereupon the action was brought.

Upon this state of facts two questions have been raised. First, whether the appellant can justify the obstruction of the ancient lights in the respondent's house, on the ground that it was otherwise impossible for him to obstruct the new lights. Secondly, supposing him to have this right, whether it continued after the necessity for its exercise ceased, by the discontinuance of the new lights.

The first question brings directly into review before this House the decision of the Court of Queen's Bench in the case of Renshaw *v.* Bean, which, in its circumstances (as stated by Lord Campbell in his judgment), closely resembled the present case. The Court there held, that "the plaintiff having by the alterations which he made exceeded the limits of his former rights, and put himself into such a position that the excess could not be obstructed by the defendant in the exercise of his lawful rights on his own land, without at the same time obstructing the former right of the plaintiff, he had only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had, at all events, until he should, by himself doing away with the excess and restoring his windows to their former state, throw upon the defendant the necessity for so arranging his buildings as not to interfere with the admitted right."

In this statement of the grounds of decision the word "right" does not appear to be used with appropriate precision and accuracy. It is not correct to say that the plaintiff, by putting new windows into his house, or altering the dimensions of the old ones, "exceeded the limits of his right," because the owner of a house has a right at all times (apart, of course, from any agreement to the contrary) to open as many windows in his house as he pleases. By the exercise of the right he may materially interfere with the comfort and enjoyment of his neigh bour; but of this species of injury the law takes no cognisance. It leaves every one to his self-defence against an annoyance of this description; and the only remedy in the power of the adjoining owner is to build on his own ground, and so to shut out the offensive windows. But as it would be hard upon the owner of a house, to which the free access of light and air had been permitted for a long period to continue for ever indebted to the forbearance of his neighbour for its enjoyment, the Courts of law, upon the principle of quieting possession, formerly held, that where there had been an uninterrupted use of lights for twenty years, it was to be presumed that there was some grant of them by the neighbouring owner; or in other words, that he had by some agreement restricted himself in the otherwise lawful employment of his own land. The Prescription Act (2 & 3

Will. 4, c. 71) turned this presumption into an absolute right, founded upon user on one side and acquiescence on the other.

It was agreed, on behalf of the appellant, that under this Act the right to the enjoyment of lights was still made to rest on the footing of a grant. I do not see what benefit his case would derive from the establishment of this position; but it appears to me to be contrary to the express words of the statute. The 3d section enacts, that when the access or use of light shall have been actually enjoyed for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

By the Prescription Act, then, after twenty years' user of lights, the owner of them acquires an absolute and indefeasible right, which so far restricts the adjoining owner in the use of his own property, that he can do nothing upon his premises which may have the effect of obstructing them. The right thus acquired must necessarily be confined to the exact dimensions of the opening through which the access of light and air has been permitted. As to everything beyond, the parties possess exactly the same relative rights which they had before. The owner of the privileged window does nothing unlawful if he enlarges it, or if he makes a new window in a different situation. The adjoining owner is at liberty to build upon his own ground, so as to obstruct the addition to the old window, or to shut out the new one, but he does not regain his former right of obstructing the old window which he had lost by acquiescence, nor does the owner of the old window lose his former absolute and indefeasible right to it which he had gained by length of user. The right continues uninterruptedly until some unequivocal act of intentional abandonment is done by the person who has acquired it, which will remit the adjoining owner to the unrestricted use of his own premises.

It will, of course, be a question in each case, whether the circumstances satisfactorily establish an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention is clearly manifested, the adjoining owner may build as he pleases upon his own land; and should the owner of the previously-existing window restore the former state of things, he could not compel the removal of any building which had been placed upon the ground during the interval; for a right once abandoned is abandoned for ever. But the counsel for the appellant carried their argument far beyond this point. The part of the case which is the most difficult for them to encounter, is that which relates to the unaltered window in the third floor. As to this they contended, that the alteration of the windows below, and the addition of the windows above, so changed the character of the previously-acquired right to light and air as entirely to destroy it. But it is not easy to comprehend how this effect can be produced by acts wholly unconnected with an ancient window, which the owner has carefully retained in its original state. And the learned counsel did not seem to expect much success from their argument in its application to the unaltered window, but directed it with more plausibility to the alterations of the windows in the lower floors. As to these they contended, that the owner of ancient windows is bound to keep

himself within their original dimensions; and that if he changes or enlarges them in any way, although he retains the old openings in whole or in part, he must either be taken to have relinquished his right, or to have lost it. But upon what principle can it be said that a person, by endeavouring to extend a right, must be held to have abandoned it; when, so far from manifesting any such intention, he evinces his determination to retain it, and to acquire something beyond it? If under such circumstances abandonment of the right cannot be assumed, as little can it be said that it is a cause of forfeiture.

It must always be borne in mind, that it is no unlawful act for the owner of a house to break out a window, or to enlarge an ancient window; although, in the latter case, some difficulty may be thrown upon an adjoining owner to distinguish the old part from the new, and so to ascertain which part he has a right to obstruct, and which is privileged from his obstruction. The alterations may be of such a nature (as in the present case) as to make it impossible for him to prevent the further restriction of his liberty to build on his own premises, without at the same time interfering with the right previously acquired against him. Yet it would be a very strange extension of the law of forfeiture to hold, that the owner of an ancient window, doing nothing but what he may lawfully do, loses his existing right, because it stands in the way of the means of interfering with an act against which the owner of the adjoining land would otherwise have been able, and would have been entitled, to defend his property; even supposing what was done by the respondent amounted to an unlawful encroachment, the question put by Mr. Baron Alderson, in Thomas *v.* Thomas, 2 C. M. & R. 239,† appears to be unanswerable—"How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim?" But the Court of Queen's Bench, in the case of Renshaw *v.* Bean, held, that "because the respondent, in the exercise of his lawful rights in his own land, could not obstruct (what they called) the excess of the plaintiff's former right, without obstructing that former right, he had only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had." This doctrine appears to me to be founded neither upon principle nor upon authority. It amounts to this—the plaintiff, having acquired an absolute right to ancient windows against the defendant, does an act which it was lawful for him to do, subject to the right of the defendant to render it useless; but because he has contrived his measures so as to prevent the defendant hindering the attempt to obtain a new right, without destroying, or at least suspending, the exercise of the old, therefore the old right may be lawfully interrupted, if, indeed, it is not altogether lost.

It may be said (and this was urged in argument at the bar), that unless such is the law, a person who has an ancient window may acquire a right to any number of additional windows, by so contriving their position as to place them completely under the protection of the ancient window, and thus effectually prevent the adjoining owner's interference with them. Undoubtedly, this is a very possible case; and yet there does not appear to be anything unreasonable or unjust in denying, even under such circumstances, a power over the ancient

lights which did not previously exist. For consider the case upon the presumption of a grant as it stood before the Prescription Act. The rights of the parties would, of course, be taken to be regulated by such grant, and it would have been contrary to principle to permit the grantor to derogate from his own grant, merely because he could not otherwise prevent an act which might prejudicially affect him, but which the grantee was not prohibited from doing by law. And precisely the same consequences seem to follow from the right being now acquired by user and acquiescence; while the user is ripening into a right, the adjoining owner has the power completely in his own hands. If he has no objection to the particular window, but is desirous of preventing any enlargement or alteration of it, or any new window being opened, he may inform his neighbour of his determination to build up against the window, unless he will enter into an agreement not to enlarge or alter it, nor to open any new one without his permission. The adjoining owner can, therefore, always protect himself by a little vigilance; and if he allows rights to be acquired, under shelter of which he is prevented using his land for the purpose of defence against the acts of his neighbour, he must blame his own want of foresight and precaution, and not the law, which will not permit an ancient right to be invaded upon any such assumed ground of necessity.

I am, therefore, of opinion that the case of Renshaw *v.* Bean cannot be supported, and that the appellant cannot justify the erection of his wall, and the consequent obstruction of the ancient lights on the respondent's buildings.

The determination of the first question in the respondent's favour renders it unnecessary to consider whether the respondent had a right to insist upon the removal of the appellant's wall after he had restored his windows to their original state. In the view which I have taken, it is impossible for me to deal with the second question in the way in which it has been treated in the Court of Common Pleas and in the Exchequer Chamber. If I had been of opinion that the acts of the respondent conferred upon the appellant the power of interfering for however short a time with the right of the respondent, I should have been compelled as a consequence to hold, that the obstruction could not be rendered temporary by any subsequent act of the respondent, because a right once lost can never be revived. But it is unnecessary to dwell upon this point, because it is obvious, that after the decision of this case, the question can never again be raised. I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed. Judgment affirmed.(*a*)

(*a*) Notes for reference: s. c. 9 Jur. N. S. 462, 8 Jur. N. S. 333; Hutchinson v. Copestake, 8 C. B. N. S. 102 (E. C. L. R. vol. 98), 8 Jur. N. S. 54; Renshaw v. Bean, 16 Q. B. 112 (E. C. L. R. vol. 83), 16 Jur. 814; Gale on Easements 499, 3d ed.

IN THE HOUSE OF LORDS.

[Before the LORD CHANCELLOR (Lord WESTBURY), Lord CRANWORTH, Lord CHELMSFORD, and other Lords.]

ROBERTS *v.* BRETT.—*Feb.* 13 and 14, and *March* 16.(*a*)

By an indenture, A. covenanted to do certain work, and within ten days to execute a bond to B. for the due performance of the work; and B. covenanted to pay certain sums of money to A. for doing the work. The bond was not given within the ten days, and B. refused to allow A. to do the work, and refused to pay the sums of money:—Held, on the construction of the instrument, that A. could not recover on the covenant, for the execution of the bond was a condition precedent to his right to recover.

THIS was an appeal from a decision of the Court of Exchequer Chamber, reported 6 Jur. N. S. 146, affirming a judgment of the Court of Common Pleas, reported 2 Jur. N. S. 592.

The facts of the case, the arguments on each side, and the authorities, will be found in the report of the case before the Court of Common Pleas.

Bovill, Q. C., *Massey Dawson*, and *Beasley*, for the appellant.

Mellish, Q. C., and *Horace Lloyd*, for the respondent.

Lord CHANCELLOR.—The question on this appeal is, whether, having regard to the true construction and intent of the agreement of the 15th May, 1855, the stipulation that the appellant should, within ten days after the date and execution of the agreement, give a bond with sureties for the due performance of the covenants on his part, be a condition the previous fulfilment of which, unless waived or released, was necessary to enable the appellant to maintain any action upon the agreement. The case has been learnedly argued at the bar, and many decisions were cited, but the question depends on simple principles.

First, having regard to the subject-matter of the agreement between the appellant and the respondent, who was the representative of a Company, it is reasonable to suppose that the Company, who were about to intrust the appellant with the laying down of a very valuable telegraphic cable, should require from the appellant security for the due fulfilment of his contract; and the requisition that the bond should be given within ten days is sufficient to show that it was intended to precede any material action under the agreement. The appellant, indeed, contends, that if he had brought The Cornwall frigate, or some other suitable vessel, alongside Morden's Wharf on the day of the date of the agreement, or the next day, the sum of 1000*l.* would have been payable to him by the respondent within a week afterwards; and thus he insists that a material part of the contract might have been performed before the expiration of the ten days allowed for the bond; and that, therefore, the giving of the bond is not a condition precedent. I cannot think that any such great expedition, if it was possible, was contemplated by the parties, or that the appellant was bound to act with any such rapidity. His engagement is, that he will forthwith, at his own expense, procure The Cornwall frigate, or some other suitable ship or vessel, for the purpose required. The word "forthwith" does not necessarily imply that this was to be

(*a*) 11 Jur. N. S. 377.

done by the appellant before he had received the bond of the respondent and his sureties, that is, before the expiration of ten days. But if the appellant had brought a suitable vessel alongside the wharf so expeditiously as to have entitled himself to the sum of 1000*l.*, and had received that sum (which must be the hypothesis) within the ten days, and before the time for giving his bond expired, I should not have thought that it affected his liability to give the bond within the appointed time. It is urged that, in the state of things supposed, the 1000*l.* might not have been paid as stipulated, and so a breach of covenant by the respondent might have occurred within the ten days. If it did, I should still be of opinion that the appellant was bound to give or tender his bond to the respondent within the prescribed time. The right to have the security of two responsible sureties for the performance of the appellant's covenant was a very material thing to the respondent's Company, and of the essence of the contract, and I do not think it could be affected by anything voluntarily done by the appellant within the ten days.

It was also contended by the appellant that the covenants to give the bonds by the appellant and respondent respectively, were mutual covenants dependent one on the other, and that there was no default of the appellant until that instant of time at which there was a like default by the respondent; and that the respondent, being in like default, could not defend himself by pleading the default of the appellant. But I think that this is not the true meaning and effect of the contract. The engagements to give the bond are not entered into in consideration one of the other; but the fulfilment of his own engagement by each of the parties is a necessary preliminary to his right to recover on the agreement. It is the true intent and object of the agreement, that each party should find security within the time prescribed. If this be not done by either party, both may be in effect released from the contract, which may fall to the ground, but neither party can recover for breach of the covenants in the agreement unless he has performed this precedent obligation. I therefore think that the judgment of the Court below should be affirmed.

Lord CRANWORTH.—I think that the judgment of the House ought to be for the defendant in error. I agree with the opinions of the learned Judges, that the giving of the bond must have been intended to be a condition precedent to any right of action for breach of any of the covenants contained in the indenture. On any other hypothesis the bond would be useless. No doubt, as there was a covenant by each party with the other, to give a bond with sureties within ten days, if default was made in giving a bond, a right of action would accrue for breach of that covenant, but such an action could produce no fruit to the party recovering in it. If brought before breach of any of the other covenants it could only result in nominal damages. If brought after a breach, no damages could be recovered, except such as would have been recoverable in an action founded on the breach itself. It would give no right against any sureties, the obtaining of which right was the sole object of the bond.

It was argued that the circumstance that the bonds were to be given, not immediately, but within ten days, was inconsistent with the hypothesis of a condition precedent. A breach, it was suggested,

might occur within the ten days, and so a right of action might accrue before any bond need have been given. This does not appear to be consistent with the hypothesis of a condition precedent. Probably the parties knew that practically no breach could occur within the ten days. But even if that is not so, the party damnified by a breach of covenant within ten days might, by giving his bond, put himself in a condition to sue for the breach, for it would certainly be no answer on the part of the defendant sued for the breach to say that he had not given his bond. Suppose, for instance, that the plaintiff had, on the day of the date of the indenture, moored a proper ship alongside Morden's Wharf, but that, after the expiration of seven days, the defendant refused to pay him the 1000*l.* The plaintiff, if he had given a proper bond, with sureties, to the defendant, would then have been in a condition to maintain an action for breach of covenant against the defendant, whether he had or had not given a proper bond to the plaintiff. But it was argued, that, even assuming the giving of the bonds to be conditions precedent, still they must be treated as mutual and dependent conditions; and that the defendant, who had given no bond to the plaintiff, could not insist on the want of such a bond from him. I do not feel the force of this argument. There is nothing in the indenture making it obligatory on either party to apply to the other for his bond. By giving the required bond, the party giving it puts himself in a condition of enforcing, if he thought fit, the performance of the covenants. If neither party, as was the case here, gave any bond, neither party could sue for any breach of covenant. This was the opinion of the Courts below, and in that view of the case I concur.

Lord CHELMSFORD.—I agree with the decision in the Court of Exchequer Chamber, affirming the judgment of the Court of Common Pleas.

The question is, whether the fourth plea is an answer to the action, or, in other words, whether the giving the bond by the plaintiff was a condition precedent to his right to recover damages from the defendant for his non-fulfilment of his part of the agreement. The only parts of the deed necessary to be noticed are—first, the covenants of the plaintiff that he would forthwith, at his own expense, procure The Cornwall frigate, or some other suitable ship or vessel, and should and would stow, or cause to be stowed, on board the said ship or vessel, the submarine telegraphic cable, which was 150 miles in length, or thereabouts, and was then at Morden's Wharf, East Greenwich, and should do various acts in fitting out and provisioning the ship or vessel, and providing sufficient officers and crew, and should and would do and perform all the several acts thereinafter covenanted to be performed by him, the plaintiff, and have the said ship fully equipped in all respects, and ready for sea, at the Nore, on or before the 15th July then next; secondly, the covenants of the defendant to pay to the plaintiffs 5000*l.* by the instalments, and at the times thereinafter mentioned—that is to say, the sum of 1000*l.* on or before the expiration of seven days after the arrival of the said ship or vessel alongside Morden's Wharf aforesaid, and the sum of 2000*l.* on or before the expiration of twenty-one days after the said ship should have arrived alongside Morden's Wharf aforesaid, and the sum of

2000*l.*, the remainder thereof, when and so soon as the said ship should put to sea from the Nore; and, lastly, the stipulation for mutual bonds, in these terms: "And it is hereby agreed and declared, that for the true performance of the covenants by the plaintiff, hereinbefore contained, and for the securing any penalties which he may incur under these presents, the plaintiff and two responsible sureties shall, within ten days from the execution of these presents, give and execute to the defendant a bond, in the penal sum of 5000*l.*; and for the due performance of the covenants on the part of the defendant hereinbefore contained, the defendant and two responsible sureties shall, within ten days from the execution of these presents, give and execute to the plaintiff a bond in the penal sum of 5000*l.*"

The learned counsel for the plaintiff argued that the covenant on the part of the plaintiff to give the bond could not be intended to be a condition precedent, because he was forthwith bound to procure the ship or vessel, so that he was to do an act before the ten days had expired within which the bond was to be given; and also that the defendant, having covenanted to pay the plaintiff 1000*l.* on or before the expiration of seven days after the arrival of the ship or vessel at Morden's Wharf, and the money being appointed to be paid on a day which might happen before the expiration of the ten days within which the bond was to be given, the giving of the bond could not be a condition precedent, according to the first rule upon the subject of dependent and independent covenants, laid down in the notes to Pordage *v.* Cole, 1 Wms. Saund. 319. They also contended that, the case fell within the third rule stated in these notes, as it was a covenant going only to part of the consideration, the breach of which might be paid for in damages. These rules are not proposed for the purpose of absolutely determining the dependence or independence of covenants in all cases, but merely as furnishing a guide to the discovery of the intention of the parties. For, as Lord Kenyon said in Porter *v.* Shepherd, 6 T. R. 668, "Conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instruments, and technical words (if there be any to encounter such intention) should give way to that intention."

Now, what may fairly be considered to have been the intention of the parties, upon the whole scope and object of the deed in question? Putting the agreement in a short form, it amounts to this:—The defendant says to the plaintiff, in consideration of your doing certain acts, and giving me a bond with sureties to secure the performance of your covenants to do these acts, I will pay you a sum of 5000*l.*, and give you a bond with sureties to secure the payment. And the plaintiff, on the other hand, covenants to do the acts and to give the bond, in consideration of the performance by the defendant of the covenants on his part to be performed. Upon this short summary of the deed, there could scarcely be a doubt that either party might refuse to perform his part of the agreement until he was secured by the bond of the other. But the counsel for the plaintiff say, that the particular terms of the deed show that this could not be the intention. In particular, they lay great stress on the word "forthwith" in the plaintiff's covenant to procure the vessel, which they interpreted to

mean "immediately;" and they urged this as a proof that the giving the bonds could not be meant to be conditions precedent, because this act of the plaintiff must necessarily have been done before the expiration of the ten days, to the last moment of which the defendant was at liberty to delay the execution of the bond. And they also insisted upon the clause for payment by the defendant of 1000*l.* before the expiration of seven days after the arrival of the vessel at Morden's Wharf, which might have happened within the ten days; and, therefore, they argued, that the case in both these respects was within the first rule in the notes to Pordage *v.* Cole, 1 Wms. Saund. 319.

It appears to me that too great force was attributed to the word "forthwith," in the agreement, and that all that was meant by it was, that the plaintiff was, without delay or loss of time, to procure a suitable vessel for receiving the telegraphic cable; and to quicken his diligence, the defendant covenanted to pay him 1000*l.* within seven days after the arrival of the vessel at Morden's Wharf. Out of regard to his own interest, too, the plaintiff would use all his expedition in commencing the performance of the agreement, because, unless he had the vessel with the cable on board equipped and ready for sea by the 15th July, he would have been liable to pay 200*l.* per week for his default. I think that the plaintiff could not have been compelled to take a single step, nor to incur the smallest expense towards procuring the vessel, till he was secured by having the defendant's bond; and that, if he chose to proceed without having this security, everything he did was at his own peril. If the defendant wished to obtain the plaintiff's progress within the ten days, he might have executed and delivered his bond, and then he would have performed all that was required of him till the first instalment of the 5000*l.* became due. It is a strong circumstance indicative of the intention of the parties, that the stipulations with respect to the mutual bonds should be conditions precedent, that these stipulations follow all the covenants entered into on both sides, and that they are agreed and declared to be given "for the true performance of the covenants hereinbefore contained." They are obviously intended, therefore, to be mutual securities for the performance of all the covenants by each of the parties respectively. This, I think, takes away all ground for saying that the covenants for giving the bonds go only to part of the consideration, and that a breach of them may be paid for in damages. Though, strictly speaking, they enter into and form part of the consideration on both sides, yet they extend to the whole of the covenants contained in the deed, and are an essential and vital part of the agreement between the parties.

Nor is it easy to see how a breach of them could be compensated in damages, or what estimate could be formed of the measure of damages for their non-fulfilment. I do not think that anything in favour of the plaintiff can be made of the circumstance of the defendant not having given his bond. It appears to me that the mutual default of the parties had the effect of virtually putting an end to the agreement, because neither of them was in a situation to insist upon performance by the other. A supposed case was put at the bar, of the plaintiff, after the ten days had expired without his bond having been given, going on to perform his covenants, and afterwards, in an action to reco-

ver the amount stipulated to be paid by the defendant, being met by a plea of the non-performance of the condition precedent. I have no difficulty in saying, that in such a case the party who may avail himself of the non-performance of a condition precedent, but who allows the other side to go on and perform the subsequent stipulations, has waived his right to insist upon the unperformed condition precedent as an answer to the action. Looking at the whole of the deed, I am satisfied that it was the intention of the parties that each should receive from the other a bond as a security for the performance of the covenants before either was bound to proceed to perform any of the stipulations contained in the deed. For these reasons I think that the judgment of the Court of Exchequer Chamber ought to be affirmed. Judgment affirmed.(a)

(a) Notes for reference.—S. C., 6 Jur. N. S. 146; 2 Jur. N. S. 592; Pordage v. Cole (1 Wms. Saund. 320 b.)

IN THE COMMON PLEAS. HILARY TERM.

[Before ERLE, C. J., WILLIAMS, J., WILLES, J., and KEATING, J.]

THELWALL v. YELVERTON. *Jan.* 30, 1864.(a)

The plaintiff, having endeavoured for two years to serve the defendant personally with a writ of summons, at length succeeded in doing so in the streets of Paris. On an application to be allowed to proceed without service of the declaration, under the 18th section of the Common Law Procedure Act, 1852—Held, that the plaintiff must make reasonable efforts to serve the declaration.

BRUCE moved, under the 18th section of the Common Law Procedure Act, 1852, for leave to proceed in an action without service of the declaration. The action was brought on a judgment of the Court of Queen's Bench, Ireland, to recover 732*l.* 12*s.* 2*d.* The writ was issued in 1862, and renewed from time to time, the plaintiff being unable to effect service on the defendant. On the 6th January, 1864, the defendant was found in the streets of Paris, and was served with the writ, but the plaintiff was unable to discover where the defendant resided.

ERLE, C. J.—If we see that reasonable efforts have been made to serve the declaration, we will allow you to take this extraordinary course, but we think that the writ only having been served on the 6th January, is too recent. You must satisfy us that you have made reasonable efforts.

WILLIAMS, J., WILLES, J., and KEATING, J., concurred.

Rule refused.

(a) 10 Jur. N. S. 295.

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2. The "right to obstruct light" possessed by the owner of a servient tenement is simply his right of building on his own land, and the opening of new windows by the owner

of the dominant tenement neither confers nor enlarges such right. *Tapling* v. *Jones*, 876

3. The "invasion of privacy by opening windows" is not a legal wrong or injury, the opening of new windows being in law an innocent act. *Id.*
4. Accordingly, where the owner of a dominant tenement, whilst preserving one ancient window, altered old windows, and opened new windows upon the same side of his house, so that the owner of the servient tenement was obliged, in obstructing the new and altered lights, also to obstruct the ancient lights—Held, that such obstruction was illegal. *Id.*
5. Renshaw *v.* Bean, 18 Q. B. 112; 16 Jur. 814 and Hutchinson *v.* Copestake, 8 C. B. N. S. 102, 8 Jur., N. S. 54, overruled. *Id.*]

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In an action brought by the executors of B. to enforce payment of the two sums so awarded,—Held, that the award was not uncertain, and that the arbitrator had not exceeded the authority given to him by the submission, in awarding that no partnership existed between A. and B., or that the shares held by B. as collateral security for the 1137*l.* 17*s.* should be delivered up to A. on payment of that sum. *Harrison* v. *Lay*, 528

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1. The 166th section of the Bankruptcy and Insolvent Act, 1861, has not a retrospective operation. *Reed*, app., *Wiggins*, resp, 220
2. Therefore, the repeal of the 202d section of the 12 & 13 Vict. c. 106, by the above-mentioned Act does not make available, even in the hands of a bonâ fide holder for value without notice, a negotiable instrument declared void by the repealed section, where the endorsement was made and the instrument became due after the Act of 1861 came into operation. *Id.*

Deed of Arrangement under 24 & 25 Vict. c. 134, s. 192.

3. The deed of arrangement contemplated by the 192d section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), is one which is made for the benefit of *all* the creditors of the debtor, and to which all may become parties. *Berridge* v. *Abbott*, 507
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1. A promise made by a client to pay money to a counsel for his advocacy, whether made before or during or after the litigation, has no binding effect. *Kennedy* v. *Brown*, 677

2. The relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation. *Kennedy* v. *Broun*, 677
3. A claim which is absolutely void by reason of an illegality or immorality in the consideration, cannot be relied on in support of a count upon an account stated. *Id.*

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2. The justices are not warranted in adjudicating a forfeiture of the license without *legal proof* of a former conviction: a mere reference to the records of the petty sessions, where former convictions were entered, will not suffice. *Id.*

BILL OF EXCHANGE.

Consideration for.

1. A. died, leaving a will which contained a bequest of 60*l.* to B. The will (which was assumed to be invalid) being in the hands of B., and C., the heir at law, being desirous of obtaining possession of it, it was agreed between them, that, upon C. giving a promissory note for 60*l.* payable on demand to B., the will should be deposited (together with the note) with one O., to be delivered up to C. on his paying the 60*l.* Subsequently, a meeting of all the parties interested in the property took place, and C. induced B. to procure the will from O. for the inspection of his (B.'s) attorney; which she did; and at this meeting a general settlement took place upon the footing that the will was not a valid instrument, nothing being then said about the promissory note. The will, however, remained in the hands of C.'s attorney:—Held, that there was a sufficient consideration for the note, and that B. might maintain an action upon it, although it had never been actually delivered to B. with C.'s authority. *Smith*, app., *Smith*, resp. 416

Acceptance by a Member of a Firm.

2. One who takes from a member of a trading firm, in satisfaction of his separate debt, a negotiable security in the name of the partnership, is bound to show that it was accepted or endorsed with the concurrence of the other partners. *Leverson* v. *Lane*, 278.
3. Ripley v. Taylor, 1 East 175, distinguished. *Id.*

Payment by Drawer.

4. A vested right of action in the holder against the acceptor of a bill of exchange can in general only be got rid of by a release or by an accord and satisfaction as between them. But, if the bill is an accommodation bill, and the holder has notice of that fact when he receives it, payment by the drawer is a complete discharge. *Cook* v. *Lister*, 543
5. Bills which, as between A. and B., the respective drawers, and C., the acceptor, were in the nature of accommodation paper, were endorsed to the plaintiffs, for value, and without notice of their character. A., B., and C. eventually stopped payment: and, upon the winding up of their estates under inspection, the plaintiffs received on account of the bills drawn by A. upon C. 4*s.* in the pound from A.'s estate, and 16*s.* in the pound from the estate of C.; and, upon the bills drawn by B. upon C., they received 5*s.* 7*d.* in the pound from the estate of B., and 14*s.* 5*d.* in the pound from the estate of C. Upon the result of the whole transactions of consignment and discount between A. and B. and the plaintiffs, there remained a large balance due to the latter; and they sued C. upon his acceptances, seeking to recover the difference between the sums paid thereon *by him* and the amount of the several bills, and interest:—Held, that they were not entitled to maintain the action either in their own right or as trustees for A. or B. *Id.*
6. Jones v. Broadhurst, 9 C. B. 173 (E. C. L. R. vol. 67), observed upon. *Id.*

Declared void by the 12 & 13 Vict. c. 106, s. 202,—see BANKRUPT, 2.

BILL OF LADING.

See SHIPPING, 2.

BILL OF SALE.

Affidavit under 17 & 18 Vict. c. 36.

Commissioner.]—An affidavit filed with a bill of sale under the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1, was intituled "In the Queen's Bench," and the person before whom it was sworn described himself as "a commissioner for taking affidavits in the Exchequer of Pleas at Westminster:"—Held sufficient; for that the Court would presume, until the contrary was shown, omnia rite esse acta, and, if the commissioner had in fact authority to take the affidavit, perjury might be assigned on it. *Cheney* v. *Courtois*, 634

BONA FIDES.

See NOTICE OF ACTION.

BOND.

Construction of Condition.

By the condition of a bond, the obligor was to pay the money by monthly instalments, and

"when and as often as he should make default in the payment of any of the said monthly instalments, he should pay to the obligees 1*s.* *in the pound for each and every pound* of the said instalment so left unpaid:" —Held, that the obligees were not entitled to anything in respect of fractional parts of a pound. *The Three Towns British Mutual Deposit and Loan Society (Limited)* v. *Doyle*, 290

And see THAMES CONSERVANCY ACT.

BRICK BURNING.

See NUISANCE. PUBLIC HEALTH ACT.

BRIEF, INSTRUCTIONS FOR.

See COSTS, 1.

BROKER.

Course of Business of.

On the 14th of May, 1861, the plaintiff, as broker, bought for the defendant at a public sale three lots of sugar in bags, the lots being respectively numbered 67, 68, and 69, the prompt day being the 20th of July. By the terms of sale, payment was to be made either by cash on the 20th of July, by acceptance at seventy days from the day of sale, or on delivery of the warrants,—interest at the rate of 5 per cent. per annum being allowed to the expiration of seventy-three days from the day of sale if payment were made within twenty-one days. On the 25th of May, the plaintiff (according to the usage of the trade), at the request of the defendant, paid the price of lot 67, and obtained a warrant for it, and cleared it at the Custom House. *He at the same time, but without any special instructions from the defendant, paid the price of lots* 68 *and* 69, *and obtained the warrants for the same.* The effect of this payment was, that the risk of loss by fire was transferred from the seller to the buyer.

It was proved to be the common course for brokers, when so employed to clear before prompt one of several lots of sugar in bags bought under one contract, to pay the price and obtain warrants for all the lots, *the broker taking the discount under the conditions of sale.* The defendant not only knew that this was the common course among brokers, and that it had been pursued in former instances in relation to sugars bought for him by the plaintiff; but he was informed by a clerk of the plaintiff shortly after the 25th of May that the plaintiff had so paid the price of lots 67 and 68, and obtained the warrants.

On the 22d of June, the defendant sent instructions to the plaintiff to clear lot 68. On the same day, and before those instructions could in the usual course of business be acted upon, a fire broke out at the bonded warehouse where the sugars were deposited, and they were destroyed:—

Held, that the plaintiff was entitled to recover from the defendant the money so paid by him in respect of lot 68 on the 25th of May, as money paid to his use. *Sentance* v. *Hawley*, 458

CAPIAS.

Sealing,—see PRACTICE, 1.

CHECK.

What amounts to Payment.

The plaintiff presented (on behalf of his employer) a check at the defendants' banking-house. The defendants' cashier counted out the amount in notes, gold, and silver, and placed it on the counter. The plaintiff took it and counted it, and was in the act of counting it a second time, when the cashier (having discovered that the drawer's account was overdrawn) demanded the money back, and, upon the plaintiff's refusal, detained him and took it from him by force:—Held, that the property in the notes and money had passed from the bankers to the bearer of the check, and that the payment was complete and could not be revoked. *Chambers* v. *Miller*, 125

COMMISSIONER.

For taking Affidavits,—see BILL OF SALE.

COMMON LAW PROCEDURE ACT, 1852.

Section 222. *Amendment,—see* AMENDMENT.

[*Practice.—Personal Service.*

The plaintiff, having endeavoured for two years to serve the defendant personally with a writ of summons, at length succeeded in doing so in the streets of Paris. On an application to be allowed to proceed without service of the declaration, under the 18th section of the Common Law Procedure Act, 1852—Held, that the plaintiff must make reasonable efforts to serve the declaration. *Thelwall* v. *Yelverton*, 89]

COMPUTATION OF TIME.

See PRACTICE, 1, 2.

CONCURRENT JURISDICTION.

See COSTS, 6.

CONTRACT.

Construction of.

1. *Extras and Additions.*]—The plaintiff contracted wih the defendant to build for the Portuguese government a steam-vessel of war for 10,400*l.*, such price or sum to be inclusive of all charges of every description except as thereinafter mentioned: such vessel to be built in a good, substantial, and

workmanlike manner, and with good sound materials of all kinds as prescribed by Table A. of Lloyd's registry for ships A. 1, 13 years, and to the satisfaction of Admiral S.; and to be delivered at Millwall on or before the 25th of April, 1859, ready for sea, "finished, fitted, found, and equipped in manner similar in all respects to that which is practised with ships or vessels of the same class in Her Majesty's navy under contracts with the Admiralty, except machinery (which was being manufactured by the plaintiff under another contract), armament, furniture, stores, plate, linen, glass, crockery, and opticians' instruments." And it was thereby agreed "that the said purchase-money or sum of 10,400*l.* is inclusive of all charges for the said ship or vessel finished and fitted perfectly in every respect; and no charges shall be demanded for extras; but any addition or additions which may be made *by order in writing* of the said Admiral S. as an extra or extras shall be paid for at a price to be previously agreed upon in writing." Penalty, 5*l.* for each day the vessel should not be delivered finished, fitted, and completed, after the day named: provided that, if the vessel should not be launched and delivered at the time appointed, by reason of any cause not under the control of the plaintiff, the same to be proved to the satisfaction of Admiral S., and to be certified by him in writing, then the said penalty should not be enforced for such number of days or for such a time as the said Admiral S. should in the certificate name. In the course of the construction of the vessel, extras and additions to the works to a large aggregate amount were done under the directions (*not in writing*) of certain officers or servants of the Portuguese government:—Held, that the plaintiff was not entitled to recover the price of these. *Russell* v. *Viscount Sa da Bandeira*, 149

2. The plaintiff further claimed the price of certain articles supplied by him when the vessel was nearly completed (at the request of the defendant's solicitor, and expressly without prejudice to his right to be paid for them if not within the contract), which Admiral S. claimed to be entitled to under the contract, as being necessary to the complete equipment of a vessel of war of her class built under contracts with the Admiralty: but which the arbitrator who settled the case found were not usually furnished under contracts made by the Admiralty with private builders, but were only supplied from the government stores to vessels when going out on active service,—such as spare masts and yards, duplicate sails, &c.:—Held, that, these articles not being within the contract, the plaintiff was entitled to be paid for them as upon a quantum meruit. *Id.*

3. *Penalties.*]—The vessel not having been completed by the day stipulated for its delivery, the defendant claimed to set off a large sum in respect of the penalty of 5*l.* per day provided for by the contract, but the arbitrator found that a considerable portion of the delay in the completion of the vessel was attributable to the disputes and objections on the part of the defendant which, upon the construction put upon the contract by the Court, were untenable:—Held, that the plaintiff was not liable for the penalties. *Id.*

4. Where parol evidence has been improperly received to explain a supposed latent ambiguity in a written document, the Court will decide upon the construction of the instrument, without regard to the finding of the jury upon such evidence. *Bruff* v. *Conybeare*, 263

5. The plaintiff, an engineer, had been professionally concerned in promoting a scheme for converting the Chard Canal into a railway, and three successive Acts were obtained for carrying it into effect, but were allowed to expire. The defendant, also an engineer, being desirous of constructing a railway over the same line of country, entered into a negotiation with the plaintiff, the result of which was reduced into writing and signed by the defendant, as follows,—

"Chard Canal and Railway Company.

"In consideration of your transferring all the interest you may have in this company, and handing me all the plans, papers, and documents in your possession, I hereby undertake to pay you the sum of 600*l.*, provided my friends succeed in carrying out the undertaking. The amount, 600*l.*, is to be paid as follows,—300*l.* on the first portion of the land required for the railway being acquired by the company, and the balance out of the three first payments received by me on the foot of construction account."

On the following day, the defendant wrote upon the document (signing it) at the plaintiff's suggestion the following,—

"It is understood that the 600*l.* herein is to become payable on the obtaining of the Act,—one moiety in six months, and the residue in three annual instalments:"—

Held, that the two writings together formed the agreement; and that the defendant's liability to pay the 600*l.* was contingent upon "the undertaking" (whatever that might mean) being carried out by his friends,—so that he might be employed as the engineer in the construction of the line. *Id.*

6. A. contracted to hire a barge of B., the contract containing a stipulation that "fair wear and tear were to be allowed by the owner," and that, when delivered up, the barge was "to be in good working order, with all her

rigging, gear, and implements complete:"—Held, a misdirection, to tell the jury that this was an absolute engagement on the part of the hirer to deliver up the barge (which was proved to have been an old one at the time of hiring) in "good working order," without reference to her condition at the commencement of the hiring. *Schroder*, app., *Ward*, resp., 410

Description of Article sold.

7. A contract for the sale of "oxalic acid" is not complied with by the delivery of an article which the jury find not in commercial language to come properly within the description of "oxalic acid,"—even where the seller is not the manufacturer of the article, and at the time of contracting expressly declines all responsibility as to the *quality*, and the buyer has had an opportunity of inspecting it, and no fraud is suggested. *Josling* v. *Kingsford*, 447

What a sufficient Acceptance to satisfy the 17th Section of the Statute of Frauds.

8. Hops were sold by sample, and, before prompt day, the buyer's foreman attended at the warehouse of the seller's factors to see them weighed, compared each pocket with the sample, and adjusted allowances on some which he objected to:—Held, that this was a sufficient acceptance to satisfy the 17th section of the Statute of Frauds, 29 Car. 2, c. 3. *Simmonds* v. *Humble*, 258

Breach of.

9. On the 9th of July, 1860, X., by his agent, agreed with the Danube and Black Sea Railway Company to receive certain goods on board his ship, to be carried to a port in the Black Sea,—the shipment to commence on the 1st of August. On the 21st of July, X. wrote to the defendant stating that he did not hold himself responsible for the contract, the agent having no authority to make it; and on the 23d he wrote again, offering a substituted contract, but still repudiating the original contract. The Company by their attorney gave X. notice that they should hold him bound by the original contract, and that, if he persisted in refusing to perform it, they should forthwith proceed to make other arrangements for forwarding the goods, and look to him for any loss. On the 1st of August, X. again wrote to the Company, stating that he was then prepared to receive the goods on board, still making no allusion to the original contract. The Company having in the mean time entered into a negotiation with another ship-owner for the conveyance of the goods, which ended in a contract with him on the 2d of August, sued X. for his refusal to receive the goods pursuant to his contract: and X. brought a cross-action against the Company for refusing to ship.

Held,—affirming the judgment of the Common Pleas, upon a special case stated in both actions,—that it was competent to the Company to treat X.'s renunciation as a breach of the contract, and to sue him thereon; and that the fact of such renunciation afforded a good answer to the cross-action of X., and sustained the Company's plea thereto, that before breach X. discharged them from the performance of the agreement. *The Danube and Black Sea Railway and Kustendjie Harbour Company (Limited)* v. *Xenos*, 825

CONVICTION.

See BEER-SHOP KEEPER.

CORPORATION BONDS.

See THAMES CONSERVANCY ACT.

COSTS.

Taxation of.

1. *Instructions for brief.*]—The master having, on a taxation as between party and party, allowed 105*l.* as "instructions for brief," though the witnesses were not very numerous or the brief very long, the Court declined to interfere with his discretion,—the questions involved in the trial being complicated and difficult. *The Duke of Beaufort* v. *Lord Ashburnham*, 598
2. *Antiquarian researches.*]—In an action involving the title to a manor, an antiquarian's charges for searches for and translations of ancient records and documents at the record office and elsewhere (which were known to exist,) were allowed. *Id.*
3. *Examination on interrogatories.*]—Costs of examining a very old witness upon interrogatories shortly before the trial, were allowed, although he was able to attend and did attend at the Assizes, but was not examined; and, by reason of his age and infirmity, the expenses of his son's journey and attendance upon him at the Assizes were also allowed. *Id.*
4. *Short-hand notes.*]—Short-hand notes not allowed as between party and party. *Id.*

Where one of several Defendants in an Action of Contract is struck out.

5. Where one of two defendants in an action of *contract* is struck out of the record at the trial, and the plaintiff obtains a verdict against the other, the ordinary course of taxation is, to tax the whole costs of the action on each side, and deduct from the plaintiff's costs a moiety of the costs of the defence,—by analogy to the old rule in the case of the acquittal of one of two defendants in an action of tort. *Redway* v. *Webber*, 284

Concurrent Jurisdiction: Order.

6. Where the plaintiff (in a case within the

London Small Debts Act, 15 & 16 Vict. c. lxxviii., s. 120), upon a compulsory order of reference in the common form made under the Common Law Procedure Act, 1854,—by which the costs of the cause are to abide the event of the award,—recovers less than 10*l.*, he is not entitled to costs, without an order. *Robertson* v. *Sterne*, 248

Of Appeals from the County Court.

7. Costs on appeals from the County Courts (or Sheriff's Court, London), are in the Common Pleas always awarded to the successful party, unless there be something very exceptional in the circumstances. *Schroder*, app., *Ward*, resp., 410

In Prohibition,—see PROHIBITION.

COUNTY COURT.

Concurrent Jurisdiction,—see COSTS, 6.

Costs of Appeals,—see COSTS, 7.

COVENANT.

On Sale of a Business,—see RESTRAINT OF TRADE.

[*Condition Precedent.*

By an indenture, A. covenanted to do certain work, and within ten days to execute a bond to B. for the due performance of the work; and B. covenanted to pay certain sums of money to A. for doing the work. The bond was not given within the ten days, and B. refused to allow A. to do the work, and refused to pay the sums of money:—Held, on the construction of the instrument, that A. could not recover on the covenant, for the execution of the bond was a condition precedent to his right to recover. *Roberts* v. *Brett*, 889]

CROWN.

Foreshore, Rights of,—see WHITSTABLE FISHERY.

DEED.

Delivery of,—see INSURANCE, 2.

DEFEASANCE.

See WARRANT OF ATTORNEY.

DEVISE.

Construction of.

1. *Estate tail.*]—Testator devised property to trustees and their heirs, to the use of his daughter A. J. for life, and after her decease, in trust for such one or more of her *children*, or his, her, or their issue, in such manner and form, &c., as A. J. should by will appoint; and, in default of appointment, "in trust for all and every of her *children*, and the heirs of their body or bodies lawfully begotten, in equal shares and proportions." The testator then proceeded,—"And in case of the death of my said daughter A. J. without leaving any *child* her surviving, and in the event of such *child* or *children* her surviving and dying without leaving any issue of his or her body, then in trust for my own right heirs for ever."

A. J. had a son who died in her lifetime, having previously joined with her in the execution of a disentailing deed:—

Held, that the son of A. J. took a vested estate tail under the will, and consequently that the ultimate limitation to the right heirs of the testator was barred. *Richards* v. *Davies*, 69

2. Affirmed in the Exchequer Chamber, 861

3. The testator devised to his wife and his friends Lloyd and Brown (whom he also appointed executrix and executors) "all that his copyhold estate, &c., and all moneys in the funds, and *securities for money, debts on mortgage*, and all other his estate and effects," &c., subject to the payment of all his just debts and funeral and testamentary expenses," in trust for the wife for life, &c. Part of the property consisted of a mortgage in fee:—Held, that the devisees took the fee in the mortgaged land, notwithstanding there were in other parts of the will directions as to what the other two trustees were to do with the "mortgage-debt" after the decease of the wife. *Rippon* v. *Priest*, 308

4. The legal interest in land mortgaged in fee will pass under the words "mortgages or securities for money." *Id.*

DISTRESS.

In name of a Mortgagee.

S., the lessee of premises, granted an underlease to S., and then mortgaged the premises to H., and afterwards sold the equity of redemption to F. F. paid off the mortgage, obtaining from the mortgagee an authority to receive the rent and an undertaking to execute a conveyance when required, and, before the execution of the conveyance to him, F. distrained for rent accruing in his time:—Held, upon the authority of Trent *v.* Hunt, 9 Exch. 14,† that the distress was lawful. *Snell* v. *Finch*, 651

DIVORCE ACT.

Registering Decree for Alimony under 1 & 2 Vict. c. 110.

1. The 52d section of the Divorce Act, 20 & 21 Vict. c. 85, enacts that all decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under the authority of that Act, shall be *enforced and put in execution* in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery

may be now enforced and put in execution. *Quære*, whether that provision authorizes the registration under the 1 & 2 Vict. c. 110, of a decree for permanent alimony? *Ex parte Holden*, 641

2. The decree having been entered on the register, the Court declined, on motion, to order it to be expunged. *Id.*

EASEMENT.

Under 2 & 3 W. 4, c. 71, s. 2.

1. The right to the passage of air is not a right to an easement within the 2 & 3 W. 4, c. 71, s. 2. *Webb* v. *Bird*, 841

2. The presumption of a grant from long-continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant. *Id.*

3. Held, therefore,—affirming the judgment of the Court of Common Pleas,—that a grant of a right to the free and uninterrupted passage of the currents of wind and air to the plaintiff's mill from over the soil of another, cannot be presumed from an uninterrupted user of the mill for twenty years. *Id.*

ELECTION.

Obstruction of,—see METROPOLIS LOCAL MANAGEMENT ACT.

ENCLOSURE.

Setting out Roads.

Held,—affirming the judgment of the Court of Common Pleas,—that it is competent to the enclosure commissioners, under the 8 & 9 Vict. c. 118, to order the valuer to set out a private or occupation road over land directed by the provisional order to be allotted to an individual in lieu of his rights in the and to be enclosed, unless the provisional order expressly declares that his allotment shall be exempt from such a burthen. *Grubb* v. *The Enclosure Commissioners for England and Wales*, 805

EVIDENCE.

Examination of Witness on Interrogatories.

1. An order for the examination of witnesses under the 1 W. 4, c. 22, may be obtained before issue joined. *Fischer* v. *Hahn*, 659

2. But, where an order was sought for the examination of the plaintiff as a witness on his own behalf, on the ground that he was about to go abroad, the Court, besides requiring the plaintiff to give security for costs, and imposing other special terms, required a further affidavit showing that the application was made bonâ fide. *Id.*

EXTRAS.

See CONTRACT, 1. PLEADING.

FACTOR.

Who an "Agent intrusted with the Possession of Goods" within the Factors' Act, 5 & 6 Vict. c. 39.

Pictures were deposited by the defendant with one I. (whose ordinary business was that of an agent for procuring business for two insurance offices in Liverpool), with instructions then or subsequently given to sell them for him for a certain commission:—Held, that I. was an "agent intrusted with the possession of goods" within the meaning of the Factors Act, 5 & 6 Vict. c. 39, and consequently that the defendant was bound by a contract of pledge bonâ fide made with him. *Heyman* v. *Flewker*, 519

FERÆ NATURÆ.

See GAME.

FERRY.

Judgment in Newton v. Cubitt, 12 C. B. N. S. 32, affirmed. 864

FORFEITURE.

Of License,—see BEER-SHOP KEEPER, 2.

FORMER CONVICTION.

See BEER-SHOP KEEPER, 2.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FREE FISHERS OF WHITSTABLE.

See WHITSTABLE FISHERY.

GAME.

Property in.

1. Held, upon the authority of Rigg v. Earl of Lonsdale, 1 Hurlst. & N. 923,—affirming the judgment of the Court below,—that the owner of land has a property in game killed thereon by a stranger. *Blades* v. *Higgs*, 844

[2. If a trespasser finds and kills game upon the land, or within the franchise of A., the qualified property which A. had in such game when alive, ratione soli or ratione privilegii, becomes absolute in A., and not in the trespasser; and such absolute property in the dead game remains in A., even if the trespasser finds, kills, and carries it off the land in one continuous act. *Blades* v. *Higgs*, (In the House of Lords), 866

3. Lord Holt's third proposition in Sutton v. Moody, 1 Ld. Raym. 250, disapproved of by Lord Chelmsford. *Id.*]

Unlawful Pursuit of Game.

4. A., B., C., and D., four labourers, were met by a police-constable early one Sunday morning on the high road leading from Coggeshall to Braintree. Suspecting from their appearance that they had been poaching, and seeing that there was something

bulky in the pocket of A., the constable searched him (the other three walking away), and drew from his pocket five wild rabbits which had been recently killed, and an iron spud. The constable then followed B., and found in his pocket a net suitable for taking rabbits, and which appeared to have been recently used, and some rabbit's fur, and fresh blood on his coat-cuffs. The constable afterwards found that C. had at a subsequent hour on the same morning sold a dead wild rabbit at a beer-house for 6*d*. As to D., the only evidence, besides his being seen in company with the others on the road was, that his clothes and shoes were found to be very wet and dirty:—

Held, that the magistrates were justified in inferring from the above evidence, as against A., B., and C., that they had been unlawfully on some land in search or pursuit of game, within the 25 & 26 Vict. c. 114, although there was no proof that either of the parties had been seen off the high road: but that the evidence against D. was not sufficient to justify a conviction. *Brown*, app., *Turner*, resp. 485

GAS.

See LONDON GAS COMPANIES ACTS.

GENERAL AVERAGE.

See LIEN, 2.

GOOD-WILL.

See RESTRAINT OF TRADE.

HEALTH.

See LOCAL GOVERNMENT ACT, 1858. PUBLIC HEALTH ACT.

HIGHWAYS.

Injury by a Horse straying on,—see NEGLIGENCE.

Liability to repair,—see LEAMINGTON IMPROVEMENT ACT.

HIRING.

See STATUTE OF FRAUDS, 2.

HORSE.

See NEGLIGENCE.

HUSBAND AND WIFE.

Conveyance by a Married Woman under 3 & 4 W. 4, c. 74, s. 91.

The Court will not permit a married woman to execute a conveyance under the 3 & 4 W. 4, c. 74, s. 91, without the concurrence of her husband (he having refused to concur), upon an affidavit merely stating that the wife had left her husband in consequence of his violence, and was living apart from him. *In re Sarah Price*, 286

And see AMENDMENT.

ILLEGALITY OF CONSIDERATION.

See ACCOUNT STATED, 1.

IMPLIED CONTRACT.

See WARRANT OF ATTORNEY.

INDEMNITY.

Contract of.

1. At the request of the defendant, the plaintiff accepted a bill for 110*l*., dated the 25th of October, 1859, and drawn by one Read, for the purpose of raising funds to relieve the latter from an execution; the defendant at the same time giving the plaintiff the following undertaking,—"You having lent your name to Mr. Read on a bill for 110*l*., payable three months from this date, the proceeds to be applied to the discharge of the amount payable to the sheriff, I undertake to share with you any loss or liability you may incur in respect of such bill."

Prior to this transaction, Read, finding himself in a state of great embarrassment, had applied to the defendant (who was his attorney) for advice; and, at the suggestion of the latter, an accountant was employed to prepare a statement of Read's affairs, to be laid before a meeting of his creditors. The plaintiff assisted the accountant in preparing this statement, and at his desire (in order, as he stated, that his imprudence might not come to the knowledge of his wife), the fact of Read being indebted to him to the extent of 2000*l*. for money lent was kept out of the statement, and altogether suppressed:—

Held, that,—the contract being one of indemnity and not of suretyship,—although the plaintiff knew that the defendant, when he agreed to be responsible for half the 110*l*., was influenced by the impression that the balance-sheet contained a true statement of Read's affairs, he was entitled to recover from the defendant one-half of the loss entailed upon him by that transaction,—the jury having negatived fraud. *Way* v. *Hearn*, 292

2. Held also, that the position of the defendant was not altered by the fact that the bill in respect of which the indemnity was given had been several times renewed without the knowledge or consent of the defendant. *Id.*

INSTRUCTIONS FOR BRIEF.

See COSTS.

INSURANCE.

Valued Policy.

1. A policy was effected for twelve months on

ship and goods from Liverpool to the coast of Africa and back, on a barter-voyage. The policy contained a stipulation that "outward cargo should be considered homeward interest twenty-four hours after arrival at first port or place of trade:" and by a memorandum the insurance was stated to be "upon ship valued at 2000*l.*, and cargo 8000*l.*, with liberty to increase the valuation of the homeward cargo." The ship sailed to Kinsembo, on the African coast, and there discharged a third of her cargo, and, after a stay there of more than twenty-four hours, proceeded towards other ports in order to take in homeward cargo, and was totally lost, together with the two-thirds of the outward cargo which remained on board:—

Held, that the valuation applied to what was substantially a *full cargo*, and not to any quantity of goods substantially less than a full cargo, and entitled the assured to 8000*l.* in the event of a total loss of a substantially full cargo, or to an indemnity in case of any partial loss, not in any case exceeding 8000*l.*; and that the principle for the valuation of a partial loss was this,—If the valuation of the whole of the intended cargo was a datum, the partial loss would be adjusted to the common proportion; but, where the value of the whole of the intended cargo could not be ascertained, the proportion which the part lost bore to the whole could not be known, and the mode of estimating a partial loss under a valued policy could not be adopted; and, consequently, that, under the circumstances, the assured would be entitled to the ordinary indemnity as under an open policy underwritten for 8000*l.* *Tobin* v. *Harford*, 791

Delivery of Policy by an incorporated Company.

2. One L., an insurance-broker, as agent for the plaintiff, gave instructions for a policy for 2000*l.*, on the ship Leonidas belonging to the plaintiff, to be prepared by the defendants, an incorporated insurance company. Before the policy was ready, the plaintiff changed his mind, and directed L. to effect a policy for 1000*l.* instead of 2000*l.*, and upon somewhat different terms. L. accordingly delivered a second slip to the company, pursuant to the last instructions, and was debited by them with the premium in the usual way, but did not pay it; and shortly afterwards a policy for 1000*l.*, duly sealed by the company, was tendered to a clerk of L., who declined to receive it, saying that it was a mistake and that the insurance on the Leonidas was cancelled: whereupon the company's clerk took back the policy and endorsed upon it the following note,—"Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto:"—Held, that, under the circumstances, there having been no complete delivery of the policy, the company never became liable thereon. *Xenos* v. *Wickham*, 381

[This judgment has since been affirmed on appeal in the Exchequer Chamber.]

"Against Total Loss only."

3. A policy was effected on a ship "against total loss only." The ship was damaged by perils of the sea to an extent to warrant the jury in finding a constructive total loss:—Held, that there was nothing in the form of the policy to exclude the liability of the underwriters. *Adams* v. *Mackenzie*, 442

INTERPLEADER.

Equitable Claim.

An equitable claim is not the subject of an interpleader summons. *Hurst* v. *Sheldon*, 750

INTERROGATORIES.

Under 1 *W.* 4, *c.* 22,—*see* EVIDENCE.

JOINT STOCK COMPANY.

Contract for Shares.

A contract to deliver shares in a joint stock company does not require the actual delivery of scrip certificates, which are the mere indicia of property: but the party contracting to deliver the shares sufficiently performs his engagement when he places the other in the position of being the legal owner of them. *Hunt* v. *Gunn*, 226

JUSTICES.

Appeals from Decisions of.

The duty of the Court, upon a case stated under the 20 & 21 Vict. c. 43, is simply to answer the question of law put to them by the magistrates. *Buckmaster*, app., *Reynolds*, resp., 62

LEAMINGTON IMPROVEMENT ACT.

Liability to Rates.

Affirmance of judgment of the Court of Common Pleas in Wallington app., White, resp. 10 C. B. N. S. 128, 865, (E. C. L. R. vol. 100).

LETTERS PATENT.

What the Subject-Matter of a Patent.

1. Tubular boilers for horticultural buildings had formerly been cast in several pieces,—a ring for the top and bottom with holes or sockets therein into which vertical tubes cast separately were fixed by means of iron cement. The plaintiff took out a patent for "an improvement in the manufacture of cast tubular boilers," which consisted in casting the whole in *one piece*, and which the jury found to be useful and beneficial to the public:—Held, not the subject of a patent. *Ormson* v. *Clarke*, 837

[Affirmed, on appeal, in the Exchequer Chamber.]

2. Whether the application in the construction of a known machine of a material never before used for the purpose,—for instance, *iron* instead of *timber* in the construction of floating-docks,—can properly be the subject of a patent,—*quære?* *Mackelcan* v. *Rennie*, 52

Construction of Specification.

3. In construing a specification, it is not competent to the inventor to pray in aid the provisional specification, in order to explain or enlarge the meaning of the complete specification. *Id.*

LETTERS TESTIMONIAL.

See QUARE IMPEDIT.

LIEN.

Claim of, where maintainable.

1. T. & Co., the owners of flats or barges at Liverpool, were employed by H. & Co., to carry certain copper-ore to one L., the owner of crushing-mills at Birkenhead, who, in consideration of being employed to crush the ore, agreed to indemnify H. & Co. against all risk in the transit. Whilst on its way to Birkenhead, the barge with the ore on board foundered in the river. T. & Co. thereupon gave notice of the loss to H. & Co., and requested to be employed to raise the cargo, to which a clerk in the employ of H. & Co. replied,—"We have nothing to do with it: you had better see Mr. L. He has the management of it." T. & Co. then went to L., who said,—"Oh: I am all right. I am insured with M.;" and, in answer to a suggestion of T. & Co. as to the necessity for prompt action, he added: "You had better prepare for getting it up; but you must go to M. for orders." T. & Co. then went to M., who said: "You had better go on with it, and do the best you can for us." T. & Co. thereupon proceeded with the work, and after incurring great labour and expense, succeeded in recovering the ore.

H. & Co. afterwards tendered the sum agreed to be paid for the carriage of the ore to Birkenhead, and demanded it: but T. & Co. refused to part with it, claiming a lien upon it for the expenses incurred in raising it from the bottom of the river:—

Held, that there was no contract for the work done, as between T. & Co. and H. & Co., in respect of which such claim of lien could be sustained. *Castellain* v. *Thompson*, 105

2. And held, that T. & Co. could not under the circumstances set up a claim for either general average or salvage. *Id.*

3. *Quære*, under what circumstances a man is entitled to sue or to assert a lien for work bestowed upon a chattel, whereby its value is increased? *Id.*

LIMITATION OF ACTION.

Under 3 & 4 *W.* 4, *c.* 27.

In 1830, A. enclosed about six acres of waste land and built a cottage thereon, and was allowed to remain in possession without acknowledgment or payment of rent down to the year 1845, when the steward of the owner of the fee served him with a declaration and notice in ejectment; whereupon A. consented to give up four acres of the land, on his being allowed to continue in possession of the cottage and the other two acres until his death. A. died in 1861:—Held, that that which took place in 1845 amounted to an actual entry, and operated as a determination of the original tenancy at will and the creation of a new tenancy at will, and consequently that the period of limitation prescribed by the 3 & 4 W. 4, c. 27, was to be reckoned from that time. *Locke* v. *Matthews*, 753

LOCAL GOVERNMENT ACT, 1858.

Construction of By-Laws.

Ventilation.]—By a by-law made by the Birkenhead Improvement Commissioners under the Local Government Act, 1858, it is provided that "every building to be erected and used as a dwelling-house shall during such use have in the rear or at the side thereof an open space exclusively belonging thereto to the extent of at least 150 square feet, free from any erection thereon above the level of the ground, other than a privy; but, where there is a water-closet, and no other privy, an open space of not less than 100 feet may be allowed; and the distance across such open space between every such building and the opposite property at the rear or side, exclusive of any common passage, shall be ten feet at least: if such building be two stories in height above the level of such open space, the distance across shall be 15 feet; if such building be three stories, it shall be 20 feet; if more than three stories, 25 feet:"—Held, that the space required to be left between the building to be erected and the opposite property must be co-extensive with the line of demarcation between such building and such opposite property, and that at no point should a less distance than that prescribed by the by-law intervene between them, exclusive of any common passage. *Anderton*, app., *Rigby*, resp., 603

LONDON GAS COMPANIES ACTS.

Construction of

1. A clause in a private Act of Parliament which is quite inconsistent with a clause in a subse-

quent public Act dealing with the same subject, is thereby repealed. *The Great Central Gas Consumers Company* v. *Clarke*, 838

2. A gas Company were by their Act of incorporation restricted to a charge of 4*s.* per 1000 cubic feet. By a subsequent public Act (23 & 24 Vict. c. 125) for the supply of gas to the metropolis, an increased standard of purity and illuminating power was required from the companies electing "to adopt the provisions of that Act as to price, purity, and illuminating power," and an increased charge allowed to be made by them:—Held, affirming the judgment of the Court of Common Pleas,—that the Company were no longer subject to the restriction as to price contained in the private Act. *Id.*

MAGISTRATES.

See JUSTICES.

MEMORANDA.

Advocate-General.

Resignation of Sir John D. Harding, 1.
Appointment of Sir R. J. Phillimore, 1.

Queen's Counsel.

Kenyon, Southgate, Hobhouse, 1.
Osborne, 804.

METROPOLIS LOCAL MANAGEMENT ACT.

Obstructing Elections of Officers.

The 21st section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, enacts, that, "if any person knowingly personate and falsely assume to vote in the name of any parishioner entitled to vote in any election under this Act, or forge or in any way falsify any name or writing in any paper purporting to contain the vote or votes of any parishioner voting in any such election or *by any contrivance attempt to obstruct or prevent the purposes of any such election*, the person so offending shall, upon conviction, be liable," &c.:—Held, that an intentional obstruction of the voting by actual violence, is an offence within the Act. *Buckmaster*, app., *Reynolds*, resp., 62

And see METROPOLITAN BOARD OF WORKS.

METROPOLITAN BOARD OF WORKS.

Powers and Duties of.

1. The Metropolitan Board of Works have no power under the 135th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, to erect any works on the bed or soil of the Thames. *Brownlow* v. *The Metropolitan Board of Works*, 768
2. They may do so under the 2d section of the 21 & 22 Vict. c. 104, provided they obtain the consent of the admiralty, pursuant to s. 27. *Id.*
3. The board having, with the consent of the Thames conservators under the 21 & 22 Vict. c. 104, s. 28, but without the consent of the admiralty, driven piles into the bed of the river, and so left them as to obstruct the navigation,—Held, that they were liable to an action at the suit of the owners of a vessel which sustained damage by grounding on such piles, without any negligence on the part of those in charge of her. *Id.*

MISDIRECTION.

See NUISANCE.

MONEY PAID.

Where maintainable,—see BROKER.

MORTGAGE.

See DEVISE, 3, 4. SHIPPING, 3.

MORTGAGOR AND MORTGAGEE.

See DISTRESS.

NEGLIGENCE.

Injury from a Strayed Horse.

The defendant's horse, being on a highway, kicked the plaintiff, a child who was playing there. There was no evidence to show how the horse came on the spot, or what induced him to kick the child, or that he was accustomed to kick:—Held, no evidence from which a jury would be justified in inferring that the defendant had been guilty of actionable negligence. *Cox* v. *Burbidge*, 430

NOTICE OF ACTION.

Under 24 & 25 Vict. c. 99.

In order to entitle a party to notice of action for a thing done "in pursuance of" the 24 & 25 Vict. c. 99 (the Act for the consolidation of the law against offences relating to the coin), it is enough that he *honestly* and bonâ fide believes he is acting in pursuance of the Act,—whether there be *reasonable* ground for such belief or not. *Hermann* v. *Seneschal*, 392

NUISANCE.

From Brick Burning.

1. It is no answer to an action for a nuisance in burning bricks so near to the plaintiff's dwelling-house as to cause substantial annoyance and discomfort to himself and his family, that the act complained of was done at a convenient time and place. *Carey* v. *Ledbitter*, 470
2. Therefore, in such a case, the refusal of the Judge to leave it to the jury to say whether the bricks had been burned in a convenient place for the purpose, is no misdirection. *Id.*
3. The Judge having directed the jury to find

for the plaintiff, if there was annoyance to a substantial degree,—Held,—in accordance with the decision of the Exchequer Chamber in Bamford *v.* Turnley, 31 Law J., Q. B. 286,—a proper direction. *Cavey* v. *Ledbitter*, 470

And see PUBLIC HEALTH ACT.

OFFENSIVE TRADES.

See PUBLIC HEALTH ACT.

OLD RECORDS.

See COSTS, 2.

OXALIC ACID.

See CONTRACT, 6.

PARTNERSHIP.

Acceptance by one of a Firm,—see BILL OF EXCHANGE, 2.

PATENT.

See LETTERS PATENT.

PAYMENT.

See BILL OF EXCHANGE, 4. CHECK.

PENALTY.

See CONTRACT, 3.

PLEADING.

Equitable Claim.

The declaration set out articles executed under the seals of the plaintiffs and defendants respectively (public companies), by which it was agreed, amongst other things, that the plaintiffs should build and complete fit for sea for the defendants two steam-vessels for a certain stipulated sum each, "such sum to be in full and entire satisfaction and payment for each such vessel, with all her apparatus and conveniences, without any other extra or additional charge, expense, or demand whatsoever:" and it was provided, that, "if at any time during the building and completing of the said vessels, any alteration or alterations whatsoever in the building, construction, or fitting of either of the said vessels, or of her apparatus or conveniences, should be directed to be made by the surveyor or other person lawfully acting in that behalf on the part of the defendants, *such alteration or alterations should not be made by the plaintiffs unless on the authority of a letter signed by the secretary of the defendants' company, stating that the court of directors had directed such alterations to be made, and specifying the precise amount which the defendants would allow for the same,*" and that no such alteration should in any other respect affect the provisions of the contract. The declaration then went on to allege, that, during the progress of the works, the defendants required divers alterations to be made in the building and construction of the vessels, and also divers extra works beyond those specified in the agreement and the specification and drawings thereto annexed, and which could not be reasonably inferred therefrom as necessary; that the plaintiffs did accordingly make all the alterations so required as aforesaid to be made, and did all the extra works so ordered by the defendants as aforesaid, *and that the defendants discharged them the plaintiffs from the stipulation in the agreement that such alterations should not be so made unless on the authority of a letter signed by the secretary of the defendants' company, stating that the directors of the defendants company had directed such alterations to be made, and specifying the precise amount which the defendants' company would allow for the same.* Averment, that the alterations amounted to a certain sum, and that the defendants refused to pay.

Plea, that there was no contract between the plaintiffs and the defendants relating to the said alterations other than the deed in the declaration mentioned, and that the alleged discharge was not a discharge by deed.

Replication, on equitable grounds, that, after the making of the deed in the plea mentioned, the defendants by parol, and without any letter signed by their secretary according to the stipulations of the agreement, required and authorized the plaintiffs to make the alterations, &c., and the plaintiffs, at the request and by the authority of the defendants, made the said alterations, and the defendants afterwards took to the vessels, and received and enjoyed, and still kept and enjoyed the benefit of the said alterations so made by the plaintiffs; and that, by reason of the premises, the plaintiffs were in equity discharged by the defendants from the stipulations in the declaration mentioned, and that the defendants ought not in equity to be allowed to set up the want of a discharge of the said stipulations by deed in bar of the plaintiffs' claim for the cost of the said alterations:—

Held, that the replication was bad, on demurrer, inasmuch as it contradicted the declaration, and showed that the plaintiffs' right, if any, was only an equitable one. *The Thames Iron Works and Ship Building Company* v. *The Royal Mail Steam-Packet Company*, 358

PLEDGE.

See FACTOR.

PRACTICE.

Computation of Time.

1. In the computation of time, where the last day falls on a Sunday or holiday, and the act is to be done by *the Court*, and not by the party, ex. gr. the sealing of a writ,—it may be done on the next practicable day. *Hughes* v. *Griffiths*, 324

2. A warrant under the Absconding Debtors Act, 1857, 14 & 15 Vict. c. 52, was issued by a County Court Judge, upon an affidavit that the defendant was about to go abroad. The seven days limited for the issuing of a capias expired on Good Friday:—Held, that a capias issued on the following Wednesday was in time,—that being the earliest day on which it was practicable to issue the writ. *Id.*

Setting aside Proceedings.

3. An attempt to enforce a warrant of attorney nearly twenty years old by a motion to enter up judgment thereon in the Court of Queen's Bench, having been defeated by the bankruptcy and certificate of the defendant, an action was afterwards brought in this Court upon the implied contract contained in the defeasance:—The Court set aside the proceedings as being against good faith. *Sherborn* v. *Lord Huntingtower*, 742

Changing the Venue.

4. The mere circumstance of the plaintiff's being an officer in the navy, and hoping to be shortly appointed to a ship, which would disable him from attending to give evidence at the trial if the venue were changed,—Held, sufficient to induce the Court to retain the venue where laid; although it was sworn that all the defendant's witnesses resided at the place to which it was sought to change it. *Channon* v. *Parkhouse*, 341

Striking out a Defendant at the Trial.

5. Where one of two defendants in an action of *contract* is struck out of the record at the trial, and the plaintiff obtains a verdict against the other, the ordinary course of taxation is, to tax the whole costs of the action on each side, and deduct from the plaintiff's costs a moiety of the costs of the defence,—by analogy to the old rule in the case of the acquittal of one of two defendants in an action of tort. *Redway* v. *Webber*, 254

Adding a Defendant at the Trial,—see AMENDMENT.

PRINCIPAL AND AGENT.

Revocation of Authority.

A dispute having arisen between the plaintiff and the defendants as to whether or not certain granite which had been prepared by the former for a work which was in the course of construction by the latter, was according to contract, the plaintiff wrote to the defendants, "I have seen Mr. E., and he has kindly consented to see you on the subject of the granite for Merthyr Tydfil, and *I have authorized him to do so, and if possible come to some amicable arrangement in the matter.*" E. having agreed with the defendants that they should have the granite for 50*l.*, the contract price being 121*l.* 16*s.* 11*d.*,—Held, that it was not competent to the plaintiff afterwards to repudiate the act of E., on the ground that he had given him secret instructions not to settle for less than 100*l.* *Trickett* v. *Tomlinson*, 663

PROHIBITION.

Costs in.

The statute 1 W. 4, c. 21, s. 1, which regulates the mode of declaring in prohibition, enacts, that, "in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess *damages*," &c.:—Held, that costs incurred by the plaintiff in prohibition in his defence to the suit in the inferior court, are not recoverable as "damages." *White* v. *Steele*, 231

PROMISSORY NOTE.

See BILL OF EXCHANGE.

PROMOTIONS.

See MEMORANDA.

PUBLIC HEALTH ACT.

Offensive Trade.

Brick-making is not necessarily a noxious or offensive business, trade, or manufacture, within the 64th section of the Public Health Act, 1848, 11 & 12 Vict. c. 63. *The Wanstead Local Board of Health*, app., *Hill*, resp., 479

And see NUISANCE.

QUARE IMPEDIT.

Right of Bishop to demand Testimonials.

Held,—affirming the judgment of the Court of Common Pleas,—that a bishop has no right to demand from the presentee of a benefice, before he will institute him, a testimonial from the bishop of another diocese in which the party has had cure of souls, of his "honest conversation, ability, and conformity to the ecclesiastical laws of England." *Marshall* v. *The Bishop of Exeter*, 829

QUEEN'S PRISON ACTS.

Construction of.

The 14th section of the Queen's Prison Act, 5

Vict. c. 22, is not affected by the 102d section of the Insolvent Debtors Act, 1 & 2 Vict. c. 110, or repealed by the 16 & 17 Vict. c. 96, s. 35. *Gore* v. *Grey*, 138

RABBITS.

See GAME.

RAILWAY COMPANY.

Crossing Turnpike Roads.

1. The 1st section of the Cleveland Junction Railway Act, 8 & 9 Vict. c. clv., which enacts that "so much of the Railways Clauses Consolidation Act, 1845, as relates to the mode of crossing roads and construction of bridges, shall respectively, except so far as the same may be by this act otherwise provided for, and except such of the provisions thereof as may be inconsistent with the provisions herein contained, be incorporated and form part of this act," incorporates not only all the provisions of the general act which regulate the crossing of turnpike roads by the railway and the construction of railway bridges, together with the 65th section, which imposes penalties for suffering the roads and approaches to the bridges to be out of repair, but also the 145th and subsequent sections, which relate to the mode of enforcing such penalties. *The Bristol and Exeter Railway Company*, app., *Tucker*, resp., 207

Liability for Loss of Passenger's Luggage.

By their Act of Parliament and their published notices, a railway Company were bound to allow each passenger to take with him a certain weight of ordinary personal luggage, without any charge for the carriage. The plaintiff, a passenger by the railway, who was stated in a special case to have had no knowledge of the Act of Parliament or the notice, brought with him as luggage a box *containing only merchandise*, but not exceeding in weight the limit prescribed for personal luggage. On the box was painted in large letters the word "Glass." No information was given by the plaintiff to the Company's servants, nor was any inquiry made by them, as to the contents of the box:—

Held,—affirming the judgment of the Court of Common Pleas,—that, inasmuch as the box contained merchandise only, and not personal luggage, there was no contract on the part of the Company to carry it, and that consequently they were not liable for the loss. *Cahill* v. *The London and North Western Railway Company*, 818

REASONABLE BELIEF.

See NOTICE OF ACTION.

REGULÆ GENERALES.

Affidavits of Verification of Certificates of Acknowledgments under 3 & 4 W. 4, c. 74.

1. From and after the first day of Easter Term next (1863), inclusive, every affidavit of the verification of certificates of acknowledgments of deeds of married women, except as hereinafter provided, shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject: Provided that this rule shall not be applicable to any such affidavits, where the acknowledgments have been taken out of England and Wales under special commissions issued prior to the said first day of Easter Term next. M. T. 1862. 2
2. The officer with whom all such certificates are filed is empowered in the interval between the date of this rule and the said first day of Easter Term next, to receive and file any affidavits of verification, whether drawn up in the first or third person. *Id.*
3. With respect to acknowledgments of deeds by married women taken in any colony or foreign possession being part of the dominions of Her Majesty,—

It is ordered that affidavits verifying the same made before any Court or Judge, magistrate, commissioner, notary public, or other person authorized to administer an oath, and containing in the jurat a statement by such Court or Judge, magistrate, commissioner, notary public, or other person, of the name or title of the office or authority which he or they respectively hold and execute, shall be received as a sufficient compliance with the requirements of the 3 & 4 W. 4, c. 74, s. 85, relating to affidavits of verification. H. T. 1863. 404

RENUNCIATION.

Of Contract,—see CONTRACT, 8.

RESTRAINT OF TRADE.

Covenant on Sale of a Good-will.

Upon the sale of the good-will of a drapery and hosiery business for 170*l.*, the vendor covenanted that he would not carry on or assist in the carrying on of a business such as that carried on upon the premises assigned, within two miles, under the forfeiture of 200*l.*, to be recovered as liquidated damages:—Held, that this covenant was broken by the vendor's supplying from a place beyond the prescribed limit, goods (to the amount of 150*l.*) to customers residing within the district, at their solicitation. *Brampton* v. *Beddoes*, 538

SALVAGE.

See LIEN, 2.

SEA-SHORE.

See WHITSTABLE FISHERY.

SEALING WRIT OF CAPIAS.

See PRACTICE, 1.

SECURITIES FOR MONEY.

See DEVISE, 3, 4.

SCRIP.

See JOINT STOCK COMPANY.

SHARES.

See JOINT STOCK COMPANY.

SHIPPING.

Construction of Charter-Party.

1. *Negligent stowage.*]—By a charter-party the owner agreed to let and the charterer to hire the ship for a certain period, the ship, being in good and working order, and her master, officers, and crew being duly shipped, to be placed at the disposal of the charterer in the port of London on a given day, and the hire to commence from and after the time that she should have been placed at the disposal of the charterer with a clean and clear hold and ready to load. It was further stipulated that the owner was to appoint, victual, and pay the master, officers, and crew, and to provide and pay for the necessary equipment for the working of the ship, and to pay all other charges whatsoever, save and except for coals, pilotages, post-charges, and labour, which were to be paid by the charterers; and that *the cargoes were to be taken on board and discharged by the charterers, the crew of the vessel rendering customary assistance so far as they might be under the orders of the master; and the charterers were to have liberty to employ stevedores and labourers to assist in the loading, stowage, and discharge thereof; but such stevedores and labourers, being under the control and direction of the master, the charterers were not in any case to be responsible to the owners for damage or improper stowage;* and, further, that "the master and owner of the said ship should devote the same attention to the cargo, should use the same endeavours to promote despatch, and should in every respect be and remain responsible to all whom it might concern, as if the said ship was loading and discharging her cargoes and performing her voyages for account of the said owner, and independently of that charter-party:"—Held, that there was nothing in this charter-party to exonerate the owner from responsibility for negligent and improper stowage by the stevedores employed by the charterer under the above stipulation. *Sack* v. *Ford*, 90

Construction of Bill of Lading.

2. *Baltic rates.*]—By a bill of lading of wool from Odessa, freight was to be paid in London, on delivery, at the rate of 80*s.* per cwt., gross weight, tallow, and other goods, grain, or seed, in proportion, as per London Baltic printed rates:"—Held, that extrinsic evidence was admissible to show, that, by the usage of the trade, the meaning of the bill of lading was, that 80*s.* per cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured. *Russian Steam-Navigation Trading Company* v. *Silva*, 610

Mortgage of Ship under 17 & 18 Vict. c. 104.

3. The 66th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), does not preclude the owner of a ship who has executed an absolute transfer of his interest therein, from showing that the real intention of it was to give the transferree only a security by way of mortgage for an advance of money. *Ward* v. *Beck*, 668

SHORT-HAND NOTES.

See COSTS, 4.

STATUTE OF FRAUDS.

Contract to answer for the Debt of another.

1. The plaintiff, the bailiff of a County Court, being about to arrest one H. under a warrant of contempt for non-payment of a judgment-debt, the defendant, in consideration that he would forbear to execute the warrant, promised to pay the plaintiff 17*l.* on a given day or surrender H.:—Held, that this was not an agreement by the defendant to be answerable for the debt or default of H., but an original promise by the defendant to pay the money or surrender H., for which a note in writing was not required by the Statute of Frauds. *Reader* v. *Kingham*, 344

Contract of Hiring.

2. A contract of hiring made on the 24th of March for a year's service, to commence on the 25th, is not void by the 4th section of the Statute of Frauds, for want of a memorandum. *Cawthorne* v. *Cordrey*, 406

What a sufficient Acceptance of Goods to satisfy the 17th Section of the Statute of Frauds,—see CONTRACT, 7.

SURETY.

See INDEMNITY.

TENANT AT WILL.

See LIMITATION OF ACTION.

THAMES CONSERVANCY ACT.

Construction of.

The corporation of London were empowered by various Acts of Parliament passed at a time when they claimed a right to the soil and bed of the Thames, and exercised the power of conservancy thereof from Staines Bridge to Yantlett Creek, to borrow money to be expended in the improvement of the navigation of the river westward of London Bridge, and to levy tolls and duties upon boats and other vessels navigating the river between Staines and London Bridge, and to charge the moneys borrowed under the Acts upon such tolls, by way of life annuity or bond.

The corporation accordingly raised large sums on bonds conditioned for the payment of certain yearly sums "out of the tolls and duties granted and made payable by virtue of the said Acts," until payment of the principal: and such yearly sums were duly paid by them down to the passing of the Thames Conservancy Act, 21 & 22 Vict. c. cxlvii.

By that Act,—which professed to be passed, amongst other things, for the purpose of carrying out an agreement between the Crown and the Corporation for the settlement of conflicting claims between them in respect of the right to the soil and bed of the Thames,—the conservancy of the river is taken away from the corporation and vested in a newly created body of twelve conservators (of whom seven are members of the corporation of London), in whom all the right and interest of the Crown and of the corporation in the bed and soil of the river are vested, as well as the power to receive and apply the tolls above mentioned, and all other tolls, dues, &c.

There is no express provision in the last-mentioned Act either for discharging the corporation from liability on these securities, or imposing any liability upon the newly created body in respect of them:—

Held,—affirming the judgment of the Court of Common Pleas,—that the performance of the obligation by the corporation having been rendered impossible by act of the law, the obligation was discharged, and no action would lie against the corporation thereon. *Brown* v. *The Mayor, &c., of London,* 828

And see METROPOLITAN BOARD OF WORKS.

TIME, COMPUTATION OF.

See PRACTICE, 1, 2.

TOLL.

See WHITSTABLE FISHERY.

Composition for,—see TURNPIKE ACTS.

TRUCK ACT.

Offences against.

1. To constitute an offence against the Truck Act, 1 & 2 W. 4, c. 37, it is not necessary that the payment of wages in goods instead of money should be the result of any contract or understanding between the employer and the workman: the mere payment is enough. *Wilson,* app., *Cookson,* resp., and *Fisher,* app., *Jones,* resp., 496
2. And the offence is not purged by a subsequent payment in money, whether made voluntarily or compulsorily under an order of justices. *Id.*

TURNPIKE ACTS.

Farming Tolls.

Compensation for tolls.]—The 55th section of the General Turnpike Act, 3 G. 4, c. 126,—which provides, that, "if the person or persons who shall be the farmer or renter, or collector or collectors of such tolls, shall take a greater or less toll from any person or persons than what is authorized or directed by this or the particular turnpike Act, he or they shall for every such offence forfeit the sum of 5*l.*, and the said agreement for renting the tolls shall, if the said trustees or commissioners shall think fit to vacate the same, become and be null and void,"—does not prevent the farmer or lessee from making compositions with persons using the road, even though it be for a period longer than the trustees themselves are by the 4 G. 4, c. 95, s. 13, authorized to compound for tolls. *Stott* v. *Clegg,* 619

TURNPIKE ROADS.

Crossing,—see RAILWAY COMPANY, 1.

VENTILATION OF DWELLINGS.

See LOCAL GOVERNMENT ACT, 1858.

VENUE.

Changing,—see PRACTICE, 4.

WARRANT OF ATTORNEY.

Implied Covenant in the Defeasance.

1. An action will not lie upon the implied contract in the defeasance of a warrant of attorney. *Sherborn* v. *Lord Huntingtower,* 742
2. An attempt to enforce a warrant of attorney nearly twenty years old by a motion to enter up judgment thereon in the Court of Queen's Bench, having been defeated by the bankruptcy and certificate of the defendant, an action was afterwards brought in this Court upon the implied contract contained in the defeasance:—The Court set aside the proceedings as being against good faith. *Id.*

WARRANTY.

See CONTRACT, 6.

WHITSTABLE FISHERY.

Rights of the Free Fishers.

By deeds of lease and release of the 11th and 12th of October, 1791, the manor of Whitstable, and the royalty of fishery or oyster-dredging within the said manor, were conveyed to E. F. and J. S. By deeds of lease and release of the 24th and 25th of October, 1792,—reciting, amongst other things, that, within the said manor of Whitstable, there was, and for many hundred years then last past had been, a fishery for the growth and improvement of oysters, extending from the sea-beach for a very considerable distance into the sea, managed by a company of free dredgers called "The Whitstable Company of Dredgers,"—the *manor* (proper) was limited to E. F., J. N., and S. S., in fee, and "the royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or the landing of any goods or merchandise within the said manor," &c., to T. F., in fee, on behalf of the company.

By an act of 33 G. 3, c. 42, the Whitstable Company of Dredgers were incorporated by the name of "The Company of Free Fishers and Dredgers of Whitstable;" and, in pursuance of that act, the fishery, and all rights appertaining thereto, were by deeds of lease and release of the 4th and 5th of ———, 1793, conveyed to the Company.

It appeared in evidence that the oyster fishery extended about two miles from the shore, and far below the ordinary low-water mark; and that the Company and those under whom they claimed had so far back as the year 1775 claimed a toll of 1*s.* from every vessel anchoring or grounding within the space covered by their conveyance: and three instances were proved of the claim having been enforced by distress from vessels anchoring on the oyster ground below low-water mark, when resisted,—there being no evidence to show that the claim had ever been resisted without recourse being had to a distress:—

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that, it being competent to the Crown to grant the soil of the sea-shore and the right to receive anchorage from vessels anchoring there (otherwise than in case of necessity arising from distress), the evidence was sufficient to justify the presumption of a grant having a legal origin; that the right to distrain was incident to the right to the anchorage; and that this right was not lost or destroyed by the severance of the marine from the terrestrial part of the manor in 1792. *The Company of Free Fishers and Dredgers of Whitstable* v. *Gann*, 853

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TO

THE REGISTRATION CASES.

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NOTICE OF OBJECTION.

Description of the Objector.

1. A notice of objection to a borough voter, in the form prescribed by the schedule B. No. 11 to the 6 & 7 Vict. c. 18, described the objector as being "on the list of voters for the parish of St. Paul." It appeared that there were two lists made out for the parish of St. Paul, viz. the 10*l.* or new qualification list, and the reserved right list. The revising barrister decided that the description of the objector was insufficient for not stating on which of the two lists his name appeared. The Court reversed his decision. *Samuel*, app., *Hitchmough*, resp., 3

Signature of Objector.

2. A notice of objection signed by the objector "Leonard Sedgwick, Fencote Hall," was delivered to the party objected to; but the *surname* of the objector (being in his usual mode of signing) was not legible by an ordinary person, though such a person might, as the revising barrister found, by comparison of the notice of objection with the entry of the objector's name, description, and qualification in the register, have understood it: the *Christian name* and *place of abode* were legible. The revising barrister having held the notice of objection insufficient,—The Court reversed his decision. *Trotter*, app., *Walker*, resp. (*Aylan's Case*), 30, (*Hallam's Case*), 40, *Sedgwick*, app., *Trevor*, resp., 42

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OBJECTOR.

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PAROCHIAL RELIEF.

Medical Attendance "On Loan."

1. *Quære*, whether obtaining medical attendance "on loan" from the guardians of a union, under the 58th section of the Poor Law Amendment Act, 4 & 5 W. 4, c. 76, is a receiving of parochial relief within the 36th section of the reform Act, 2 W. 4, c. 45. *Devenish*, app., *Digby*, resp. 28

Voter's Father chargeable to the Parish.

2. A.'s father becoming chargeable to the parish, A. was called upon by the guardians to contribute towards his support, and it was arranged that he should pay (and he did pay) to the parish officers 1*s.* 6*d.* per week so long as his father remained chargeable. The sum so paid did not suffice to maintain his father; and accordingly it was contended that the excess was in effect a

receipt of parochial relief by A. within the 36th section of the Reform Act, and disqualified him to be upon the register:—Held,—affirming the decision of revising barrister,—that A. was not disqualified. *Trotter*, app., *Trevor*, resp., 48

QUALIFICATION OF VOTER.

Description of Qualification.

1. *Tenant.*]—One who occupied a farm of sufficient value to confer the franchise for a county was described in the third column of the register as "tenant." This description being objected to, the revising barrister held it to be "commonly understood as designating a tenant occupying at a rent," and therefore sufficient; but that, at all events, for the purpose of more clearly and accurately defining the qualification, he had power to amend by changing "tenant" into "farm, as occupying tenant," and he amended accordingly. The Court upheld his decision. *Birks*, app., *Allison*, resp. (*Brisby's Case*), 12

2. One who occupied a farm of sufficient value to confer the franchise for a county, was described in the third column of the register as "tenant," and the local situation of the property was described in the fourth column as "Brock Lane." It appeared that the property the occupation of which constituted the qualification consisted of a farm-house in Brock Lane and of land elsewhere, but in the same township, which was always let with the farm-house. This description being objected to, the revising barrister amended by altering that in the third column into "land, as occupying tenant," and that in the fourth column to "Brock Lane *and elsewhere in Thornton:*"—The Court upheld his decision. *Birks*, app., *Allison*, resp.(*Dixon's Case*), 24

SIGNATURE OF VOTER.

See NOTICE OF OBJECTION, 2.

TENANT.

See QUALIFICATION OF VOTER.

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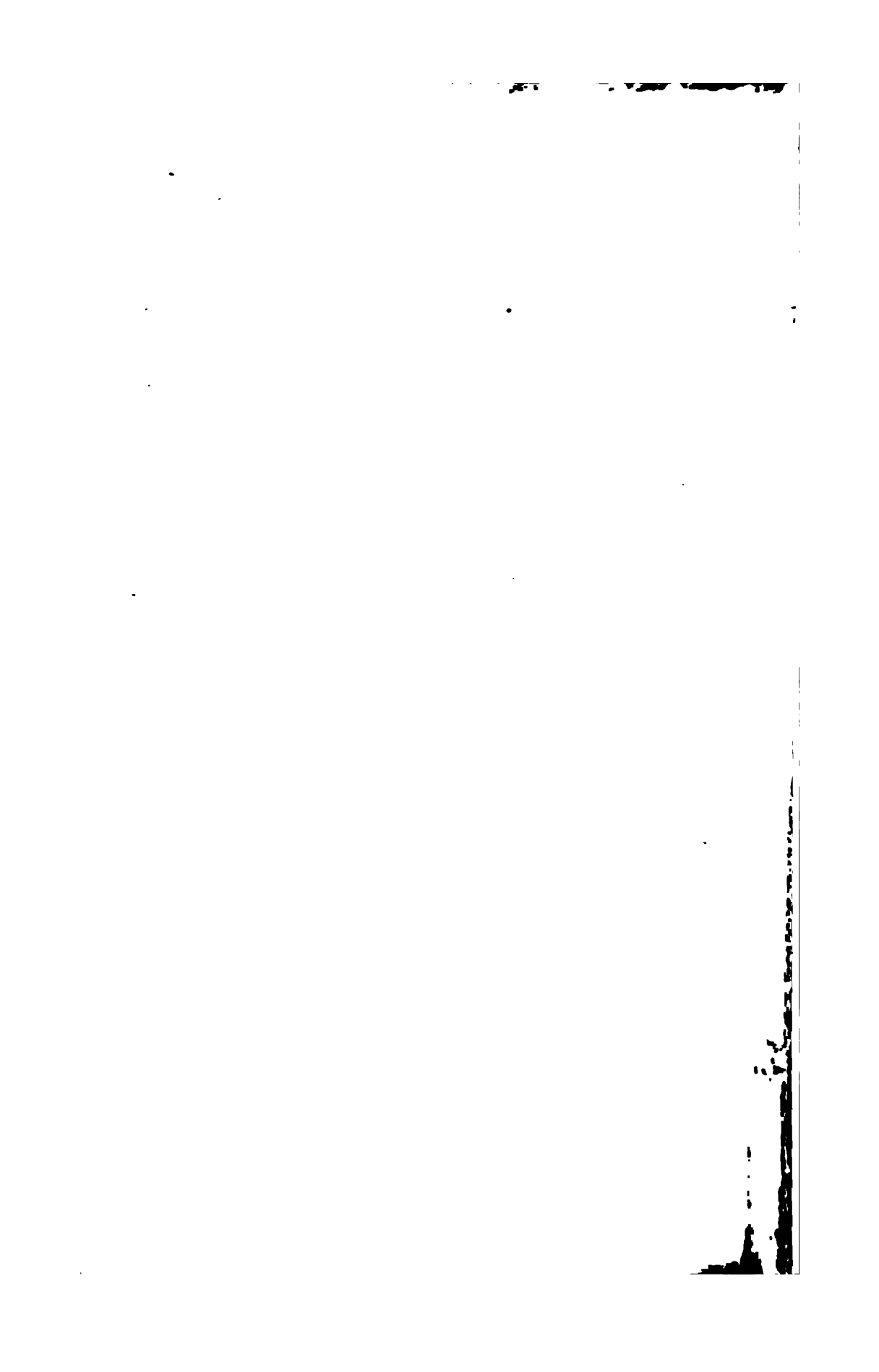

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